139-642

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 578. 275

H. W. SANFORD, PLAINTIFF IN ERROR,

vs.

C. W. SANFORD.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

FILED OCTOBER 22, 1887.

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H. W. SANFORD, PLAINTIFF IN ERROR,

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1 In the Supreme Court of the United States.

H. W. SANFORD
vs.
C. W. SANFORD
} No. —. Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the supreme court of the State of Oregon, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court, before the Honorable William P. Lord, W. W. Thayer, and Reuben S. Strahan, all of you, between C. W. Sanford, plaintiff and defendant in error, and H. W. Sanford, defendant and plaintiff in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by complaint doth appear, and we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid and in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. eighteen hundred and eighty-seven, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being then and there inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States of America should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this July 18, 1887.

[Seal United States Circuit Court, Oregon.]

R. H. LAMSON,
Clerk of the Circuit Court of the United States for the District of Oregon,
By R. B. LAMSON,
Deputy Clerk.

[Endorsed:] In the Supreme Court of the United States. H. W. Sanford *vs.* C. W. Sanford. Writ of error. Filed July 18th, 1887. W. H. Holmes, clerk, by —— ——, deputy clerk.

2 In the Supreme Court of the State of Oregon.

H. W. SANFORD, Plaintiff in Error, vs. C. W. SANFORD, Defendant in Error. } Petition for a Writ of Error of Supreme Court of the United States.

To the Honorable William P. Lord, chief justice of the supreme court of the State of Oregon:

The petition of H. W. Sanford respectfully shows unto your honor—

1. That on the 4th day of September, A. D. 1885, your petitioner commenced on action at law in the circuit court of the State of Oregon for the county of Coos against C. W. Sanford, defendant in error above named, to recover the possession of the northeast quarter of the southeast quarter of section nine, in township twenty-four south, of range twelve west, of Willamette meridian, situated (situated?) in Coos county, Oregon.

That on the 17th day of September, A. D. 1885, the said C. W. Sanford, as in such cases provided by the laws of the State of
3 Oregon, filed in said cause, in said circuit court of the State of Oregon for the county of Coos, his cross-bill in the nature of a complaint in equity, wherein he, the said C. W. Sanford, was plaintiff and your petitioner, H. W. Sanford, was defendant, wherein he alleged, among other things, that on and prior to the — day of April, A. D. 1882, he, the said C. W. Sanford, and your petitioner were conflicting and contesting claimants, each claiming the right to purchase of the Government of the United States, under the provisions of the law of the United States commonly called the preemption law, the tract of land hereinbefore described; that on said — day of April, A. D. 1882, a contest was instituted in the district land office of the United States at Roseburg, Oregon, to determine the respective rights of your petitioner and the said C. W. Sanford to purchase said tract; that said contest was thereafter tried in said district land office and decided by said district land office in favor of the said C. W. Sanford and against your petitioner; that your petitioner appealed from the said decision of said district land office to the Commissioner of the General Land Office, who upon
4 the hearing of said appeal affirmed said decision of said district land office; that your petitioner appealed from said decision of the Commissioner of the General Land Office to the honorable the Secretary of the Interior, who reversed said decision of said Commissioner of the General Land Office and the said district land office and decided that your petitioner had the right to purchase said tract of land and receive the patent for the same; that thereafter the defendant in said suit, your petitioner, received a patent of the United States conveying to him said tract of land; that the said C. W. Sanford was entitled to said patent, and that certain conduct of your petitioner set up in said cross-bill estopped him to claim any right to purchase said tract or to receive the patent for the same; that said acts and conduct making said estoppel were

not before the Hon. Secretary of the Interior and were not considered or passed upon by him; wherefore he prayed that your petitioner should be perpetually enjoined from prosecuting his said
5 action at law to recover the possession of said tract of land, and that your petitioner might be compelled by the decree of said court to hold the legal title to said tract conveyed to him by said patent in trust for said C. W. Sanford and to convey the same to the said C. W. Sanford; that on the 26th day of September, 1885, your petitioner filed in said court his answer to said cross-bill, in which he admitted that said contest and said several appeals and said several decisions had taken place and been made, and that he had received said patent, but denied the several acts alleged in said cross-bill as constituting an estoppel upon this petitioner to purchase said tract, and denied that said acts were not submitted to or passed upon by the Secretary of the Interior, and denied that the said C. W. Sanford was entitled to purchase said tract or to receive the patent therefor, and alleged that all of said matters set
6 up in said cross-bill were passed upon, adjudicated, and decided by the Hon. Secretary of the Interior in favor of your petitioner and against said C. W. Sanford in said decision set up in the cross-bill, and that in the said decision the said Secretary of the Interior decided that the said C. W. Sanford had forfeited all claim to said tract by abandoning the same for more than three years; that the issues in said suit were duly joined and the evidence therein taken, and that at the May term, 1886, of said circuit court of the State of Oregon for the county of Coos said suit was tried in said court on the pleadings and evidence therein, and on the 22nd day of September, A. D. 1886, said court made and entered its decree in said suit in favor of the said C. W. Sanford and against your petitioner, perpetually enjoining your petitioner from any and all proceedings at law to recover the possession of said tract of land, and decreeing that your petitioner held the legal title to
7 said property in trust for the said C. W. Sanford, and requiring your petitioner within twenty days after the date of said decree to convey said real property to the said C. W. Sanford, and that the said C. W. Sanford have and recover against your petitioner a judgment for his costs and disbursements.

That thereafter your petitioner duly appealed from said decree to the supreme court of the State of Oregon.

That at the March term, 1887, of the supreme court of the State Oregon the said cause was tried in said supreme court of the State Oregon on said appeal, and on the 16th day of March, A. D. 1887, the said supreme court of the State of Oregon made and entered its judgment and decree in said cause, wherein and whereby it in all things affirmed the decree of the circuit court of the State of Oregon for the county of Coos, hereinbefore described, and made and entered its judgment in favor of the said C. W. Sanford and against your petitioner for the costs and disbursements of said appeal.

8 That thereafter, on the — day of May, 1887, the said supreme court of the State of Oregon made and caused to be made, and transmitted and caused to be transmitted, to the circuit

court of the State of Oregon for the county of Coos its mandate, wherein and whereby it remanded said cause to said circuit court and directed and commanded said circuit court to enter the said decree of said supreme court of the State of Oregon in its journal and docket the same, and thereafter, on May 11th, 1887, said mandate was duly received and filed by the clerk of said circuit court and said decree duly entered in its said journal and docketed.

That at said trial of said cause in the supreme court of the State of Oregon your petitioner presented and claimed in said court that said patent and said decision of the Secretary of the Interior constituted a final adjudication between your petitioner and the said C. W. Sanford; that your petitioner had the right to purchase said tract of land from the United States and to receive the patent
9 for the same, and that the said C. W. Sanford had no right to purchase said tract or to receive the patent for the same; that all the matters set up in the cross-bill were decided in favor of your petitioner and against the said C. W. Sanford by said decision of the Secretary of the Interior; that the cross-bill stated no facts upon which the court could set aside, reverse, or overrule said decision of the Secretary of the Interior; that there was no evidence upon which this your petitioner could be lawfully deprived of the right to said tract of land which he derived from said patent and the laws of the United States; that by force of said patent and said decision of the Secretary of the Interior, made and issued under and by the authority of the statutes of the United States in such cases made and provided, this your petitioner had a complete legal and equitable title to said tract of land, and that there were no allegations in the cross-bill or facts proven by the evidence which could warrant or authorize said supreme court of Oregon to
10 make any decree depriving your petitioner of his said right and title derived under said patent; that the supreme court of the State of Oregon in and by its said judgment and decree decided against the said right and title of your petitioner so claimed by him under the laws of the United States and said patent and decision of the Secretary of the Interior; that said questions of the rights of your petitioner under said patent and the statutes of the United States were the only questions raised or tried in said cause.

Your petitioner respectfully shows unto your honor that in its said judgment and decree the supreme court of the State of Oregon erred—

1st. In that it decided that there were or are any sufficient allegations in said cross-bill to warrant, authorize, or support the said decree against your petitioner.

2nd. In that the evidence and findings of fact of said court do not support or warrant said decree.

3rd. In that it, without any authority of law, deprives him of his rights granted him by said patent to said land.

11 4th. In that it denied to your petitioner his right claimed by him at said trial under the laws of the United States; that the said decision of the Secretary of the Interior and said patent

were and are a conclusive adjudication in his favor of all the matters set up in said cross-bill.

5th. In that said court ought to have made and entered its decree in favor of your petitioner and against the said C. W. Sanford that said cross-bill should be dismissed, and that your petitioner should have and recover against the said C. W. Sanford a judgment for his costs and disbursements.

6th. The said court erred in that it affirmed the judgment and decree of the circuit court of the State of Oregon for the county of Coos, hereinbefore described, and entered September 22nd, 1886.

7th. The said court erred in that it did not reverse said judgment and decree of said circuit court of the State of Oregon for the county of Coos, made and entered September 22nd, 1886.

12 Wherefore your petitioner respectfully prays that your honor may allow in his favor a writ of error of the Supreme Court of the United States, directed to the judges of said supreme court of the State of Oregon and to the judge of the circuit court of the State of Oregon for the county of Coos, requiring them or him—in whichever of said courts said record may be—to transmit, under the seal of said court, together with said writ, the record and proceedings in said case to the Supreme Court of the United States, at Washington, at a time to be specified in said writ, to the end that said Supreme Court of the United States may examine the same and determine as law and justice may require in respect of the errors herein alleged by your petitioner.

Dated July 2nd, 1887.

WATSON, HUME & WATSON AND
A. M. CRAWFORD,
Attorneys for H. W. Sanford, the Plaintiff in Error.

13 The within petition was duly presented to me this July 5th, 1887, by Watson, Hume & Watson, attorneys for H. W. Sanford, the petitioner, and it is hereby ordered that the prayer of said petition be granted, and that the writ of error therein prayed for be, and the same is hereby, allowed.

Dated Salem, Oregon, July 5th, 1887.

WM. P. LORD,
Chief Justice of the Supreme Court of the State of Oregon.

14 In the Supreme Court of the State of Oregon.

H. W. SANFORD, Plaintiff in Error,
vs.
C. W. SANFORD, Defendant in Error.

Know all men by these presents that we, H. W. Sanford and S. R. Crawford and H. W. Dunham, are held and firmly bound unto C. W. Sanford, the above-named defendant in error, in the sum of one thousand dollars, to be paid to the said C. W. Sanford, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and

our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated the 27th day of June, A. D. 1887.

Whereas the above-named H. W. Sanford has presented to Hon. William P. Lord, chief justice of the supreme court of the State of Oregon, his petition for a writ of error of the Supreme Court of the United States, to be allowed by the said William P. Lord, chief justice of the supreme court of the State of Oregon, directed to the said supreme court of the State of Oregon, to review a certain judgment and decree of the supreme court of the State of Oregon rendered in a suit in said court wherein the said C. W. Sanford was plaintiff and the said H. W. Sanford was defendant, and more particularly described in the petition of the said H. W. Sanford for the allowance of said writ of error:

Now, therefore, the condition of this obligation is such that if the above-named H. W. Sanford shall prosecute said writ of error to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

H. W. SANFORD. [SEAL.]
S. R. CRAWFORD. [SEAL.]
H. W. DUNHAM. [SEAL.]

Signed, sealed, and delivered in presence of—
A. M. CRAWFORD.
A. D. BORDER.

STATE OF OREGON, } ss:
County of Coos, }

I, S. R. Crawford, being duly sworn, depose and say that I am one of the sureties in the foregoing bond; that I am a resident freeholder within the State of Oregon, over the age of twenty-one years, and that I am worth in property situated therein the sum of one ($1,000) thousand dollars over and above all my just debts and liabilities, exclusive of property exempt from execution.

S. R. CRAWFORD.

Subscribed and sworn to before me this June 27th, 1887.
[SEAL.] A. M. CRAWFORD,
Notary Public.

STATE OF OREGON, } ss:
County of Coos, }

I, H. W. Dunham, being duly sworn, depose and say that I am one of the sureties in the foregoing bond; that I am a resident freeholder within said county and State, and that I am worth in property situated therein the sum of one ($1,000) thousand dollars over and above all my just debts and liabilities and exclusive of property exempt from execution.

H. W. DUNHAM.

Subscribed and sworn to before me this 27th day of June, 1887.

A. M. CRAWFORD,
Notary Public.

[SEAL.]

Bond approved July, 1887.

WM. P. LORD,
Chief Justice.

17 UNITED STATES OF AMERICA, } ss:
District of Oregon, }

To C. W. Sanford, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday in October, A. D. eighteen hundred and eighty-seven, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Oregon, wherein H. W. Sanford is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Salem, in said district, this July 18th, 1887.

WM. P. LORD,
Chief Justice.

With the following indorsements:

STATE OF OREGON, } ss:
County of Coos, }

I, L. Harlocker, sheriff of Coos county, in the State of Oregon, hereby certify that I received the annexed citation this 20th day of Sept., A. D. 1887, and that I personally served the same on C. W. Sanford, defendant in error, in Coos county, State of Oregon, on the 20th day of September, A. D. 1887, by delivering to and leaving with S. H. Hazzard, of the firm of Hazzard and Wilson, at-
18 torneys for said C. W. Sanford in said case, personally, a copy of said citation, duly certified to by me as sheriff of Coos county aforesaid to be such copy.

L. HARLOCKER,
Sheriff of Coos County, in the State of Oregon.

And further indorsed: U. S. circuit court, district of Oregon. H. W. Sanford, pl'ff in error, *vs.* C. W. Sanford, def't in error. Citation on writ of error. Filed Sept. 23rd, 1887. W. H. Holmes, clerk of the supreme court.

19 *Transcript.*

In the Circuit Court of the State of Oregon in and for the County of Coos.

C. W. SANFORD, Pl'ff,
vs.
H. W. SANFORD, Def't. } Cross-Bill in Equity.

20 In the Circuit Court of the State of Oregon for the County of Coos.

C. W. SANFORD, Plaintiff,
vs.
H. W. SANFORD, Defendant.

Now comes the plaintiff above named, and for his cause of suit herein states and alleges the following facts:

1. That on the 1st day of September, 1871, the plaintiff, C. W. Stanford, was a single man, over the age of twenty-one years, and a citizen of the United States, and was a qualified pre-emptor under the laws of the United States, and on that day made a settlement in person on the northeast quarter of the southeast quarter of section number nine, in township twenty-four south, of range twelve west, of the Willamette meridian, situated in Coos county, Oregon, the same then being public land of the United States and subject to be pre-empted under the laws thereof, with the intention to hold said described land and land of the United States adjoining thereto, not exceeding one hundred and sixty acres, as a pre-emption claim, and of entering the same as soon as the land should be surveyed, and ever since the plaintiff settled upon the said described land he has continually resided upon, cultivated, and improved the said
21 land with the intention of entering the same as a pre-emption claim.

II. That during the year 1871, and prior to the time when the plaintiff settled upon the land above described, the defendant had settled upon certain unsurveyed lands of the United States with the intention of purchasing the same under the pre-emption laws of the United States as soon as the same was surveyed, and that the plaintiff, at the request and with the knowledge and consent of the said defendant, settled upon the certain lands hereinbefore mentioned, which immediately adjoined the land settled upon by the defendant as aforesaid.

III. That the lands settled upon by the said plaintiff and defendant as aforesaid were duly surveyed by the United States surveyor about the year 1879; which said survey was duly approved and the plat of the said survey duly filed in the district United States land office at Roseburg, Oregon, on the 31st day of July, 1879, and it was then found that the land so settled upon by the said plaintiff and defendant embraced the E. $\frac{1}{2}$ of N. E. $\frac{1}{4}$, N. $\frac{1}{2}$ of S. E. $\frac{1}{4}$, S. W.

¼ of S. E. ¼, and S. E. ¼ of S. W. ¼ of sec. 9 and the N. ½ of N. W. ¼ of sec. 16, all in T. 24 S., R. 12 W., of Willamette meridian, the N. ½ of the N. W. ¼, sec. 16 aforesaid, being school land.

22 4th. That about the month of January, 1872, the said plaintiff, at his own expense, with the consent and assistance of the said defendant, built a small house upon the N. E. ¼ of the S. E. ¼ of the said sec. 19, it being then understood and agreed by both the said plaintiff and defendant that the land embraced in the said N. E. ¼ of the S. E. ¼, as shown by the subsequent survey aforesaid, was a part of the claim of the said plaintiff; but the said house was, about the year 1875, burned down and destroyed.

5th. That about the month of September, 1875, the said plaintiff, at his own expense, with the consent and assistance of the said defendant, commenced to build and partially finished a barn upon the said N. E. ¼ of S. E. ¼, it being then understood and agreed by both the said plaintiff and defendant that the land embraced in the said N. E. ¼ of the S. E. ¼, as shown by the subsequent survey aforesaid, was a part of the claim of the said plaintiff; but the said barn was, about the year 1879, burned down and destroyed.

6th. That about the month of December, 1875, the said plaintiff, at his own expense, with the knowledge and consent of the said defendant, commenced to build a house on the said N. E. ¼ of

23 S. E. ¼; that the said defendant assisted the said plaintiff to bring the lumber with which the said house was built from the mill, well knowing the purpose for which the same was to be used and where the said house was to be built, but making no objections thereto until some three or four weeks' work had been done on the said house, when the said defendant did make certain objections to the completion thereof; that the said house was at the time of the completion thereof and is now of the value of $250.

7th. That between the month of January, 1876, and the month of January, 1883, both inclusive, the said plaintiff, at his own expense, with the knowledge and consent of the said defendant, built various fences upon the said N. E. ¼ of the S. E. ¼, and that said fences are of the value of $350.

8th. That between the winter of 1875–'76 and the winter of 1881–'2, both inclusive, the said plaintiff, at his own expense and with the knowledge and consent of the said defendant, set out and cultivated an orchard of about 250 fruit trees on the said N. E. ¼ of the S. E. ¼, and that the said orchard is of the value of $600.

9th. That about the month of January, 1877, the said plaintiff, at his own expense and with the knowledge and consent of the

24 said defendant, built a wood-shed and chicken-house upon the said N. E. ¼ of the S. E. ¼, which said wood-shed and chicken-house are of the value of $75.

10th. That about the month of October, 1879, the said plaintiff, at his own expense and with the knowledge and consent of the said defendant, built a small barn upon the said N. E. ¼ of the S. E. ¼, which said barn is of the value of $50.

11th. That about the month of March, 1878, said plaintiff, at his own expense and with the knowledge and consent of the said de-

fendant, built a bridge on the said N. E. ¼ of the S. E. ¼, across the creek between his house and the county road, which said bridge is of the value of $50.

12th. That about the month of July, 1881, the said plaintiff, at his own expense and with the knowledge and consent of the said defendant, built a large barn upon the said N. E. ¼ of the S. E. ¼, which said barn is of the value of $350.

13th. That about the month of January, 1880, the said plaintiff, at his own expense and with the knowledge and consent of the said defendant, built a smoke-house and a milk-house on the said N. E. ¼ of the S. E. ¼, which said smoke-house and milk-house are of the value of $100.

14th. That between the month of January, 1872, and the
25 month of October, 1883, both inclusive, the said plaintiff, at his own expense and with the knowledge and consent of the said defendant, cleared, grubbed, and prepared for cultivation about 12 acres of bottom land on the said N. E. ¼ of S. E. ¼, and that the said clearing, grubbing, and preparing of the land for cultivation is of the value of $600.

15th. That between the month of January, 1875, and the month of July, 1883, the plaintiff, at his own expense and with the knowledge and consent of the said defendant, planted small fruits upon the N. E. ¼ of S. E. ¼, consisting of currants, raspberries, gooseberries, and other small fruits, which are of the reasonable value of $100.

16th. That the orchard, fences, and buildings and other improvements mentioned in the foregoing allegations, with the exception of the house and barn burned as aforesaid, are each — all, at the date of verification of this complaint, remaining and standing upon the said N. E. ¼ of the S. E. ¼, and are each and all of the reasonable value of the amounts alleged in the respective allegations, and each and all improve and increase the value of the said N. E. ¼ of the S. E. ¼ to the extent of the said respective amounts, to wit, in the aggregate to the amount of two thousand five hundred and twenty-five dollars ($2,525.00).

17th. That each and all of the said improvements, to wit,
26 the orchard, fences, buildings, and other improvements aforesaid, were made, set out, and built by the said plaintiff in good faith, and that the said plaintiff at each and all the times of making the said improvements believed and had good reason to believe that he had the exclusive right to purchase the said N. E. ¼ of the S. E. ¼ under and by virtue of the pre-emption laws of the United States, and that he would be allowed so to purchase the same.

18th. That at no time from the date of settlement made by the plaintiff upon said land, in the year 1871, as aforesaid, until the month of December, 1875, did the said defendant claim or pretend or attempt to claim any right whatsoever to the land comprising the said N. E. ¼ of S. E. ¼ or any part thereof, and that on divers and sundry occasions during the said period, to wit, between the years 1871 and 1875, inclusive, the said defendant represented both to the said plaintiff and numerous other persons that the land comprising the said N. E. ¼ of S. E. ¼ and every part thereof was a part

of the claim of the said plaintiff, and that he, the said defendant, neither had nor expected to have any right, title, or interest in the same or any part thereof, and that at no time from the date of the first settlement of the said plaintiff, in the year 1871, as afore-
27 said, until the 2d day of February, 1884, at which date the defendant gave the plaintiff a notice to quit the possession of the said premises, with the one exception hereinbefore mentioned, about December, 1875, did the said defendant in any way object to the said plaintiff improving the said N. E. ¼ of the S. E. ¼ or holding possession thereof.

19th. That the greater portion of the said improvements could not be removed from the said N. E. ¼ of the S. E. ¼, and no portion thereof could be so removed without entailing great loss and expense upon the plaintiff.

20th. That on the 16th day of December, 1875, the said plaintiff commenced an action in the justice's court for Marshfield precinct, in the said county of Coos and State of Oregon, against the said defendant, by which said action the said plaintiff sought to recover from the said defendant the possession of certain personal property, and that the said defendant, in his answer to the said plaintiff's complaint in the said action and as his sole defence to the said complaint, alleged a general partnership as existing between the said plaintiff and the said defendant, and that the property described in the complaint was partnership property, which said partnership was denied in the reply of the said plaintiff in the said action; that the said action was thereafter appealed to the circuit court of the State of Oregon for the county of Coos, and at
28 the May term of 1877 of the said court was there tried before a jury, to wit, on the 28th day of May, 1877, and the said jury then and there brought in a verdict for the said defendant, upon which said verdict judgment was duly rendered and entered for the said defendant; that the only issue which the said jury were called upon to decide under the pleadings and evidence in the said action was the existence or non-existence of the partnership between the said plaintiff and defendant and whether or not the property described in the complaint was partnership property; that by their verdict for the said defendant as aforesaid the said jury found that such partnership did exist; that in order to induce the jury to find said verdict the said defendant was sworn as a witness on his own behalf on the trial of said cause and, among other things, testified before said jury that he and the said plaintiff had been general partners since the year 1872, and that by the terms of the partnership agreement they had settled upon adjoining land claims; that each of them was to own land claims—his own land claim—when final proof should be made on the same, but that the improvements on each of their respective claims was to be considered partnership property as well as all stock and farming implements and
29 utensils owned by them, and that if the improvements upon one of their land claims should exceed in value the improvements upon the other claim the one having the improvements of

the greater value was to be charged with the excess in the settlement of their partnership accounts.

21st. That on the 8th day of August, 1877, the said plaintiff commenced a suit in the said circuit court of the State of Oregon in and for the county of Coos for a dissolution of the partnership theretofore existing between the said plaintiff and the said defendant and as found so to exist in the action at law aforesaid and for an accounting therein, and it was by the said plaintiff alleged in his complaint in the said suit that the said partnership was formed and existed as follows, to wit: That on or about the 1st day of May, 1872, the said plaintiff and the said defendant formed a partnership for the purpose of carrying on a general copartnership in all kinds of business in which they might see proper to engage, under the following agreement: that the said plaintiff and the said defendant each were to put into the said firm all of the property of every kind and description, as well real and personal, of which they were the owners, and were to pay all debts which either of them had at that date jointly
30 out of the capital stock of said copartnership, each agreeing to give his time and labor as a part of the capital stock, and the proceeds therefrom to be and become a part of the capital stock, and all debts incurred by either of them were to be partnership debts and paid from the capital stock of the firm, as well as all debts incurred in the management of said general business; and it was especially agreed and understood between the parties that whatever business either plaintiff or defendant should engage in should be considered partnership business, excepting that it was agreed and understood between the parties plaintiff and defendant herein that each was to hold the certain claim on what was then supposed to be Government land which each then claimed, consisting of one hundred and sixty acres of land, and that the valuation of the improvements made thereon was to be considered as partnership funds and a part of capital stock of said firm, and if the value of the improvements upon one claim should be greater than upon the other claim, upon dissolution and settlement the deficiency was to be made up out of other partnership property, and that with this exception it was understood and agreed that the property of every kind and description should be considered community property and di-
31 vided between plaintiff and defendant share and share alike; and that said copartnership should continue so long as the said parties thereto might desire, and that each should live and have support out of the funds of said copartnership; and that the said plaintiff and the said defendant continued to act under said copartnership until the 10th day of December, 1875; that the said defendant in his answer in the said suit expressly admits the said partnership as alleged in the said plaintiff's complaint therein as aforesaid, except that the said defendant says that there was excepted from the said partnership an undivided one-fourth interest in eight hundred and forty acres of land owned by the said defendant and situated on South slough, in Coos county, Oregon, and that the final decree in the said suit found the said partnership so to exist, with the exception alleged in the said answer; that the said defendant in

his sworn testimony in the said suit, reduced to writing and by the said defendant duly signed, as shown by the records of the said suit, and read in evidence on the trial thereof, amongst other things testifies as follows, to wit:

"Q. What was your contract with C. W. Sanford with regard to the improvement of your land claims on Haines' slough and the subsequent adjustment of the same?

32 Ans. An equal valuation; an equal division of the valuation.

Q. State whether C. W. Stanford located a claim under that partnership agreement; and, if so, whether he still holds the same.

Ans. He did; he does.

Q. What is the probable value of that claim as compared with the land claim you hold—that is to say, the land claim you located under that agreement and now hold?

Ans. I don't know that there is any difference in the claims; it's all land adjoining on the same creek.

Q. About what difference was there, if any, of the value of improvements on said claims on the 10th day of December, 1875, the time when you ceased to act in partnership?

Ans. That date should be the 14th of November, same year. I should suppose there was a difference of $300 or $350 value of improvements.

Q. What improvement has C. W. Sanford made upon his place since the time when you ceased to act as partners?

Ans. Fencing and building.

Q. Of what probable value or costs?

Ans. Perhaps $250.

Q. What improvements did C. W. Sanford have on his land claim on December 10th, 1875, and what was their value?

33 Ans. Some cleared land, some fencing, grubbing, barn, and a little cabin; value, about $500.

Q. What was the value of the cabin?

Ans. I suppose it would cost 15 or 20 dollars in labor.

Q. What was the value of the barn?

Ans. 25 dollars.

Q. What amount of land is now embraced in C. W. Sanford's claim?

Ans. I can't state. I suppose he claims 160 acres.

Q. What amount of land do you hold and constitutes your claim?

Ans. I hold—I am only in possession of 80 acres of unsurveyed land and 80 acres of entered land, owing to C. W. Sanford's settling so close to my residence.

Q. What is the other land you spoke of besides the unsurveyed land?

Ans. The same quality of land adjoining.

Q. State whether your claim, then, is now limited to 160, including the 80 acres of school land.

Ans. It is, for the reason that he has settled that close to my residence.

Q. The $500 improvements you have mentioned as being on the land claim of C. W. Sanford, is that the land claim upon which he resides?

Ans. It is.

Q. Are the improvements that you have referred as made
34 upon the land claim near the house in which he resides?

Ans. He built his house upon those improvements upon that clearing, but he agreed in the first place to give me room for 160 acres of squatters' right in settling on the land.

Q. Is not the $500 improvements that you charge him with having out of the capital stock of the partnership and for which you ask him to account to the partnership the same identical claim upon which he now resides?

Ans. It is; but he built on it under protest, not giving me room for full squatters' rights.

Q. Do you assert any claim to the land upon which these improvements are made?

Ans. I did at the time. I entered a protest to him. I asked him previous to this to build on the next forty and we could make the improvements on the next forty instead of where they was.

Q. Do you assert any claim to the land upon which C. W. Sanford resides now?

Ans. The land is not in a situation for litigation. I have not decided positively when it becomes so to contend for it.

Q. If you should decide to contend for it and should obtain it, would you then take all of the improvements that you say are worth $500?

35 Ans. I can't say that I shall contend for it at the present day. As I said before, it will be owing to how much I am damaged in this lawing.

Q. Then you expect to charge him with $500 as the valuation of the improvement upon his claim, and then, if you consider yourself damaged in suit, to try and hold the land and improvements upon which his claim is situated?

Ans. I can't say anything about it at this date. I claim 160 acres of land there as a resident there six or eight months before he saw the creek or put foot on the creek.

Q. If you take 160 acres of land, as you claim, will that include the land where his improvements now are?

Ans. Including the 80 acres entered land, it would not cover it, to the best of my knowledge.

Q. Do you include the 80 acres of entered as part of your claim?

Ans. I do; as the beginning of the west end of my location. C. W. Sanford has settled at the east end of my present possessions.

Q. When you say in your direct examination that the improvements upon your land claim are worth $800, and that the improvements upon C. W. Sanford's land claim are worth $500, what land claim do you refer to?

Ans. I refer to the present improvements made on the two separate clearings.

Q. You then refer to the separate land claims upon which you each now reside?

36 Ans. I do.

Q. And yet you want to charge him with the $500 improvements you say are upon his land claim, and then after the determination of this suit, if you consider yourself injured and see proper, you want to hold his claim and improvements as a part of your claim?

Ans. As I said before, I don't know what course I might take at the present day to obtain my rights."

That in the settlement of the said partnership by the said court in the said suit the said court duly made its decree, by which the said plaintiff was charged with the value of all improvements made on the said N. E. ¼ of S. E. ¼ prior to the 10th day of December, 1875, and that one of the arguments used by the said defendant's counsel in the trial of said suit was that the said defendant held only 80 acres of Government land, and that the plaintiff held 160 acres; that in the settlement of the said partnership in the said suit as aforesaid all the individual earnings of the said plaintiff between the 1st day of May, 1872, and the 10th day of December, 1875, were accounted partnership property and the said plaintiff was charged with the same; that the improvements referred to by the said defendant in his said foregoing testimony in said action and said suit were situated upon said N. E. ¼ of S. E. ¼ and was a part of the land claim of the plaintiff and the part where the improve-

37 ments of the plaintiff were all situated at the time.

22nd. That shortly after the survey aforesaid, set forth in the third subdivision of this complaint, to wit, on the 8th day of September, 1879, the said plaintiff duly filed in the United States district land office at Roseburg, in the State of Oregon, his declaratory statement covering the E. ½ of the N. E. ¼ and the N. ½ of the S. E. ¼ of the said sec. 9, in T. 24 S., R. 12 W., of Willamette meridian, alleging settlement Sept. 1st, 1871, and that thereafter, to wit, on the 27th day of September, 1879, that the said defendant filed in the said district land office his declaratory statement covering the S. W. ¼ of the N. E. ¼, the W. ½ of the S. E. ¼, and the S. E. ¼ of the S. W. ¼ of said sec. 9, which said declaratory statement of the said defendant was afterwards, by permission of the Commissioners of the General Land Office, amended so as to cover the N. ½ of the S. E. ¼, the S. W. ¼ of the S. E. ¼, and the S. E. ¼ of the S. W. ¼.

23rd. That thereafter, to wit, on or about the — day of April, A. D. 1882, the said defendant instituted a contest with the said plaintiff in the said district land office to decide their respective rights to purchase the said N. E. ¼ of the S. E. ¼ of the said sec. 9; that an order was made by the register of said district land office allowing the defendant to take the testimony of his witnesses before the county clerk of Coos county, Oregon, and notice of the time and place where the depositions of defendant's witnesses were to

38 be taken, together with the interrogatories to be propounded to them, *were* duly served on the said plaintiff, and that

thereupon the said plaintiff retained an attorney to attend to the matter of said contest and delivered the said papers so served upon him as aforesaid to said attorney, who agreed to attend to the same; but said attorney failed and neglected to prepare or serve any interrogatories or cross-interrogatories, and on the day set for the taking of the depositions of said defendant's witnesses the said plaintiff and his attorney appeared before said clerk for the purpose of cross-examining the said defendant and his witnesses, but were by said clerk denied the privilege so to do for the reason that said plaintiff had not served or filed cross-interrogatories, as required by the rules of the Land Department. Said clerk also refused to take the depositions of the said plaintiff or his witnesses for the reason that the interrogations to be propounded to them had not been served upon the said defendant; that the plaintiff or his said attorney had no knowledge of the rules of practice in said Land Department which requires the service of interrogations or cross-interrogations, but supposed the cross-examination of defendant's witnesses and the examination of plaintiff's witnesses in the
39 taking of said depositions would be taken upon oral interrogatories, as had been the practice in said Land Department until shortly before that time; that the said plaintiff was a poor man, who had a family to support, and lived on said contested land, about 80 miles from said district land office, and was unable to obtain the attendance at said land office, at the time set for the hearing of said contest, of persons who are material witnesses for the said plaintiff in said contest, although he made every effort in his power so to do; that the said plaintiff was not able to induce any person to attend the said contest at said land office with him, and that no subpœnas issued out of said land office for witnesses; but succeeded in obtaining the attendance of two persons who then lived near said land office, but who formerly lived near the residence of said plaintiff on said contested land; that the depositions of the plaintiff herein and the persons before mentioned were taken at said land office and used upon the hearing of said contest, but the said persons were not as fully conversant with the facts regarding the plaintiff's residence upon and cultivation of said N. E. ¼ of S. E. ¼ of said sec. 9 as witnesses that he was unable to obtain the attendance of or depositions of for the reason aforesaid, but that, notwithstanding the fact that the evidence on the part of the plaintiff herein did not show the facts as fully as could
40 have been done but for the reason aforesaid, on the hearing of said contest it was decided by the said district land office that the said N. E. ¼ of the S. E. ¼ should be awarded to the said plaintiff; that thereafter the said defendant appealed from the decision last aforesaid to the Commissioner of the General Land Office, and that on such appeal the said Commissioner duly affirmed the said decision last aforesaid, and that thereafter the said defendant appealed from the said decision last aforesaid of the said Commissioner to the Secretary of the Interior, and that thereafter, to wit, in or about the month of September, 1883, M. L. Joslyn, acting Secretary of the Interior, reversed the decision of said district land office

and the said decision of the said Commissioner and awarded the said N. E. ¼ of the S. E. ¼ to the said defendant; that after said appeal was taken from the decision of said Commissioner, and while the said appeal was pending before the said Secretary of the Interior, and notwithstanding the fact that the defendant had attorneys representing his interests in the matter of said contest at the city of Washington, in the District of Columbia, yet the said defendant made a trip from his residence, in said Coos county, to the said city of Washington, and then and there, by the use of means unknown to the
41 said plaintiff, induced the said acting Secretary of the Interior to make said decision awarding said land to said defendant; that the plaintiff herein then was and still is a poor man, and was unable to go to the said city of Washington in person or to employ an attorney to represent him there in the matter of said contest; that the said defendant, in his said deposition taken in the matter of said contest and used in evidence on the hearing thereof, falsely swore that he had occupied and cultivated the said N. E. ¼ of S. E. ¼ prior to the fall of 1875, and that he had always intended to hold the same as a part of his land claim, and had never ceased to regard and to treat said tract as a part of his pre-emption claim while the said plaintiff occupied it, prior to 1875, and that since the said date the said plaintiff herein had never occupied said tract of land with the consent of the said defendant herein, whereas, in truth and in fact, the said defendant never had cultivated or improved the said N. E. ¼ of S. E. ¼ or any part thereof, and never had claimed the same or any part thereof or declared his intention to claim or attempt to claim the said N. E. ¼ of S. E. ¼ as a part of his land claim until a long time after the determination of the suit in equity between the plaintiff and the defendant hereinbefore referred to.

24th. That the said Secretary of the Interior based his said decision upon the ground that the defendant was the oldest settler
42 upon the public lands, and that he ought to have the right to include a full claim of 160 acres of land — his claim, and that the question as to how far the defendant should be estopped from asserting any claim to the said N. E. ¼ of S. E. ¼ by reason of his declarations, acts, and doings, as in this complaint before stated, never was decided or determined by the said district land office or Commissioner or the said acting Secretary of the Interior in the making of said decisions in the matter of said contest.

25th. That on the 30th day of November, 1883, the said defendant made final proof on the said N. E. ¼ of the S. E. ¼, and purchased the same by virtue of the pre-emption laws of the United States, and that thereafter the final receipt for the same was duly issued to the said defendant from the said district land office.

26th. That at all times since the 1st day of September, 1871, and until and including the date of the verification of this complaint, the said plaintiff has been in the quiet, peaceable, and sole possession of the N. E. ¼ of the S. E. ¼ and every part thereof, and is now and always has been ready and willing to pay to the defendant the purchase price paid by him for the said tract of land to the United States if the defendant will convey the same to the plaintiff.

27th. That on the 4th day of September, 1885, the said defendant commenced an action of ejectment against the plaintiff herein in the circuit court of the State of Oregon for the county of
43 Coos for the purpose of obtaining the possession of the said N. E. ¼ of the S. E. ¼ and ousting the said plaintiff from the possession thereof, and that thereupon the said plaintiff has duly made his answer to the complaint in the said action of ejectment, in which said answer the said plaintiff has shown that he is entitled to relief arising out of the facts requiring the interposition of the court of equity and material for his defense, and now files this complaint in the nature of a cross-bill — a defence to the said action of ejectment.

28th. That the defendant ought not to be permitted to allege that he is the owner or entitled to the possession of said N. E. ¼ of S. E. ¼ as against the plaintiff, but that in equity and good conscience he should be adjudged to be estopped from asserting any claim thereto against the plaintiff by reason of the decree hereinbefore referred to and the declarations, acts, and conduct of the said defendant hereinbefore mentioned.

Wherefore the said plaintiff prays for a decree of this court staying and perpetually enjoining the proceedings at law in the said action of ejectment; that the said defendant be adjudged to hold the legal title of the said N. E. ¼ of the S. W. ¼ in trust for the plaintiff herein, and that he be required to convey the same
44 to the plaintiff herein within ten days from the date of the decree in this suit, and that if he fail to do that said decree shall stand as a conveyance; or if the court shall hold that the said defendant is entitled to recover the possession of the said N. E. ¼ of the S. E. ¼, then in that case the said plaintiff prays the court to decree that the said defendant pay to the said plaintiff the sum of 2,525 dollars, the value of the improvements made by the said plaintiff on the said northeast quarter of the southeast quarter, and that the said sum of 2,525 dollars be declared to be a lien on said land in favor of the plaintiff; and that the said defendant be restrained from obtaining the possession of said described land until he shall have paid to the plaintiff the amount of said lien, and that if the said defendant shall fail to pay to the plaintiff the amount of said lien within thirty days after the date of said decree, then that the court make an order that the said tract of land be sold, and that an amount sufficient to pay the lien of said plaintiff be paid to him; and that plaintiff have such other and further relief as the court shall deem just and equitable under the facts stated in this complaint, together with his costs and disbursements in this suit.

HAZARD & WILSON,
Attorneys for Plaintiff.

STATE OF OREGON, }
County of Coos, } *ss:*

45 I, Cyrenus W. Sanford, being first duly sworn, say that I

am the plaintiff named in the foregoing complaint; that I know the contents thereof and believe the same to be true.

C. W. SANFORD.

Subscribed and sworn to before me this 17th day of September, A. D. 1885.

[SEAL.] SHEDDEN F. WILSON,
Notary Public for Oregon.

With the following indorsements: In the circuit court of the State of Oregon for the county of Coos. C. W. Sanford *vs.* H. W. Sanford. Complaint. Filed Sept. 17, 1885. J. J. Lamb, Co. clerk. Hazard & Wilson, attorneys for plaintiff.

46 In the Circuit Court of the State of Oregon for Coos County.

C. W. SANFORD, Pl'ff,
vs.
H. W. SANFORD, Def't. } Cross-Bill in Equity.

Demurrer.

Now comes defendant in the above-entitled suit, by his attorneys, and demurs to plaintiff's complaint or cross-bill filed herein, and for cause of demurrer alleges:

First. That the said complaint or cross-bill does not state facts sufficient to constitute a cause of suit against this defendant, nor any defense to the complaint filed in this court in the action at law now pending, wherein this plaintiff is defendant and this defendant is plaintiff, which said complaint the said cross-bill attempts to answer.

Second. For special demurrer to said complaint or cross-bill defendant alleges:

First. That the complaint does not show that the plaintiff herein possessed, at the various times alleged therein or at any time, all the qualifications of a legal pre-emptor under the laws of the United States, nor that the defendant herein did not possess such qualifications at the times when he exercised the privileges of such
47 pre-emptor on the land in dispute, as shown in said cross-bill.

Second. That said cross-bill or complaint nowhere shows that the land officers, in determining defendant's rights in the premises and in awarding the contested land to him as against this plaintiff, which is the subject of this suit, were imposed upon or deceived by fraudulent practices or false testimony used before them and procured by said defendant.

Third. That said complaint or cross-bill nowhere alleges that the plaintiff herein has in any way been misled or deceived by the fraudulent practices, representations, or false testimony of this defendant or of any other person or persons procured by him; but that said cross-bill does explicitly show that at various times and in divers ways, from 1875 to the date of the verification of the said cross-bill of pl'ff herein, the defendant did emphatically assert his

claim to the premises which are the subject-matter of this suit, to wit: In Dec., 1875, see counts 18 and 20; in August, 1877, shown in count 21; in 1879, as shown by count No. 22; again, in Apr., 1882, see count No. 23, and in Nov., 1883, as shown by counts 24 and 25.

48 Third. That, as shown by counts 24 and 25 of plaintiff's cross-bill, all of the matters and facts necessary to determine the relative rights of the plaintiff and defendant herein to the N. E. ¼ of the S. E. ¼ of section No. 9, in t'p No. 24 S., of R. 12 west, Will. mer., Oregon, the same being the premises now in litigation, were, after due and legal notice, fully heard and examined in the manner provided by law and by the proper authorities of the United States, and fully settled and adjudicated and the land awarded to the defendant herein; all of which facts plaintiff's cross-bill sets forth.

Fourth. That said plaintiff's complaint or cross-bill nowhere alleges fraud against this defendant as a reason for the interposition of equity or for any other purpose.

Third. Defendant, for cause of demurrer to the counts of plaintiff's complaint or cross-bill numbered consecutively from 4 to 17, inclusive, and to each of them separately, alleges that said counts nor either of them state facts sufficient to constitute a cause of suit or any defence to defendant's complaint in his action at law now in this court and hereinbefore mentioned.

49 Second. That in all the matters referred to in said counts, from four to eighteen inclusive, affecting the rights of this plaintiff for which any relief might be afforded in this suit as are elsewhere shown in said cross-bill, to wit, in counts 24 and 25 thereof, were fully adjudicated and determined by the Land Department of the United States in 1883, as before shown.

Fourth. That said counts of said cross-bill numbering from four to eighteen and the counts numbering from 21 to 25, inclusive, are demurred to by this defendant on the ground that they are ambiguous, uncertain, and unintelligible and are inconsistent, in this: the said counts allege peaceable possession by the plaintiff herein of the premises in dispute and valuable improvements made thereon by the said plaintiff, with the knowledge, consent, and assistance of defendant, from 1871 down to 1883, while the 21st count of said cross-bill shows that a suit in equity was commenced against him by the defendant herein, during the pendency of which the fact was developed that this defendant did claim this land. Count No. 22 of said cross-bill shows that in 1879 defendant filed his declara-

50 tory statement for this land, claiming the same as a pre-emption. Count 23 of said cross-bill shows that in April, 1882, the defendant herein instituted a contest in the United States Land Office against the plaintiff herein for this same tract, and the 24 and 25 counts of plaintiff's complaint show that after a full hearing of said contest by the proper authorities the Hon. Secretary of the Interior Dep't of the U. S. duly awarded the land to this def't and issued to him a certificate for a patent therefor, the plaintiff herein showing his own failure for want of evidence, making no new dis-

covery of evidence, alleging no fraud against defendant, and showing that he at that time abandoned further prosecution of his remedy at law by neglecting to move for a new trial, according to the rules of practice in the Dep't of the Interior.

Fifth. Defendant demurs to count No. 19 of pl't'ff's cross-bill, and for ground alleges that said count No. 19 fails to state facts sufficient to constitute a cause of suit or any defense to defendant's action at law now pending in this court.

Sixth. Defendant demurs to the 20 and 21 counts of
51 plaintiff's complaint or cross-bill filed herein on the ground that said counts nor either of them state facts sufficient to constitute a cause of suit or any defense to defendant's action at law before mentioned.

Second. Further specially demurring to counts Nos. 20 and 21 of said complaint, alleges that any right of action which the plaintiff might have had arising from any of the facts set forth in said counts would be at law and not in equity.

Third. That, further specially demurring to said counts numbered 20 and 21, defendant alleges that by failing to defend at the proper time, when said contest was before the U. S. Land Office, where, if at all, said facts would have been admissible as evidence, he has waived his right to such defence.

Wherefore defendant asks judgment, etc.

CRAWFORD & LOCKHART AND C. B. WATSON,
Att'ys for Def't.

With the following indorsements: Circuit court, Coos county. Sanford *vs.* Sanford. Demurrer to cross-bill in equity. Filed Sept. 23, 1885. J. J. Lamb, clerk. Crawford & Lockhart and C. B. Watson, att'ys for def't.

52 In the Circuit Court of the State of Oregon for Coos County.

C. W. SANFORD, Pl't'ff,
vs.
H. W. SANFORD, Def't. } Cross-Bill in Equity.

Motion to Strike Out.

Now comes defendant in the above-entitled suit, by his attorneys, and moves to strike out that portion of plaintiff's complaint or cross-bill commencing with the words "about the month of Jan., 1872," the same being the first line of the third page, to and including the numerals "2,525.00," in the 30th line of the 6th page of plaintiff's complaint, the same being the counts from 4 to 16, inclusive, of said cross-bill, for the reason that the same is sham, irrelevant, and immaterial. Further, defendant moves to strike out all of count No. 19 of pl't'ff's complaint on the ground that the same is frivolous. Defendant further moves to strike out the whole of counts No. 20 of pl't'ff's cross-bill for the reason that the same is sham, irrelevant, and immaterial; moves to strike out all that part of

count No. 21 commencing with the sixth line of the 10th
53 page of pl't'ff's cross-bill, to and including the fourth line on the 17th page, for the reason that the same is sham, irrelevant, pleading — testimony. Defendant further moves to strike plaintiff's complaint or cross-bill from the files of this case for the reason that the same is sham, frivolous, and irrelevant.

CRAWFORD & LOCKHART AND C. B. WATSON,
Att'ys for Def't.

With the following indorsements: Circuit court for Coos county. Sanford *vs.* Sanford. Motion of def't to strike out cross-bill. Filed Sept., 23, 1885. J. J. Lamb, clerk. Crawford & Lockhart and C. B. Watson, att'ys for def't.

54 Be it remembered that at a regular term of the circuit court of the State of Oregon in and for the county of Coos, began and held at the court-house, at Empire City, on the 21st day of September, 1885, at which were present the Hon. R. S. Bean, judge; J. W. Hamilton, district attorney; I. Hacker, sheriff; J. J. Lamb, clerk; then on the 24th day of September, 1885, being the 4th judicial day of said term, when, among others, the following proceedings were had, to wit:

In the Circuit Court of the State of Oregon for the County of Coos.

C. W. SANFORD, Plaintiff,
against
H. W. SANFORD, Defendant. } Cross-Bill in Equity.

Now, at this time, the plaintiff above-named appears by Hazard & Wilson, his attorneys, and the defendant by Crawford & Lockhart and C. B. Watson, his attorneys; and the above cause coming on to be heard upon the demurrer heretofore filed by defendant to the complaint, in the nature of a cross-bill, filed by the plaintiff, and also upon a motion to strike out certain portions of said complaint, which said demurrer and motion were heard and determined at the same time, and now, after hearing the argument of counsel upon said demurrer and motion, the court being fully advised in the
55 premises, it is considered and ordered by the court that the said demurrer and motion be, and the same are hereby, overruled, and that defendant have leave to answer.

(Journal signed) R. S. BEAN, *Judge.*

In the Circuit Court of the State of Oregon for the County of Coos.

C. W. SANFORD, Plaintiff,
vs.
H. W. SANFORD, Defendant.

Defendant, for answer to plaintiff's cross-bill in equity:

1st. Denies that on the first day of September, 1871, the plaintiff was a qualified pre-emptor under the laws of the United States, and

denies that on that day plaintiff made settlement in person or at all upon the N. E. ¼ of the S. E. ¼ of section 9, t'p 24 S., of R. 12 W., of Will. mer., Coos Co., Or., described in plaintiff's complaint, or that he ever made or attempted to make settlement thereon prior to December, 1875, but alleges that on the — day of May, 1871, the defendant was a single man, over the age of 21 years, a citizen of the U. S., had never had the benefit of the pre-emption act under the Revised Statutes of the U. S., sec. 2259, and was not the owner of 320 acres of land in any State or Territory of the U. S.; that on said day he settled upon and improved the lands designated
56 in the U. S. survey thereof, made in 1879, as the N. ½ of the S. E. ¼, the S. W. ¼ of the S. E. ¼, and the S. E. ¼ of the S. W. ¼ of section No. 9, t'p 24 S., of R. 12 W., Will. mer., Coos county, Or., intending in good faith to appropriate the same to his own exclusive use and benefit as a pre-emption claim; that ever since said date defendant, together with his own family, has continuously resided upon, cultivated, and improved the same, and from said day of settlement to the — day of December, 1875, was in the sole, exclusive, and undisputed possession of the same and every part thereof.

2nd. Denies that during the year 1871 or at any other time plaintiff, at the request or with knowledge or consent of defendant, settled upon the lands hereinbefore described or upon any part thereof.

3d. Denies that plaintiff and defendant or either of them, in 1871 or at any other time, ever settled upon or included within or intended to embrace in their said pre-emption claims or either of them the land which, after the said survey, proved to be the N. ½ of the N. W. ¼ of section 16, in t'p 24 S., of R. 12 W., or any other tract of school land whatever, but alleges that during the summer of 1872 the defendant herein procured to be made a private survey of the land embraced in his pre-emption claim hereinbefore described, by which survey he discovered that said N. ½ of N. E. ¼ of sec. 16 aforesaid adjoined his said pre-emption claim on the S., and, the
57 same being common-school land, he, defendant, immediately thereafter applied to the board of State land commissioners for the State of Oregon to purchase the same, and on the 19 day of August, 1873, received a deed from the State of Oregon therefor.

That thereafter, in pursuance of the decree made in the equity suit mentioned in plaintiff's complaint, said school land was sold and the proceeds thereof equally divided between plaintiff and defendant as partnership property.

4th. Defendant admits that about the month of January, 1872, he and plaintiff did build a small house or cabin upon what afterwards proved to be the N. E. ¼ of S. E. ¼ of said section 9 before mentioned, but denies that the same was built at plaintiff's expense, and denies that it was then or ever understood or agreed between plaintiff and defendant that the said land was or should be a part of the pre-emption claim of plaintiff, but alleges, on the contrary, that the said house was built at the joint expense of plaintiff and defendant, under the partnership agreement mentioned and set forth in plaintiff's complaint, and with the express understanding and agreement that if the same should fall within defendant's said pre-emption claim

when the same should be surveyed said house should be removed therefrom.

5th. Denies that about the month of Sept., 1875, or at any other time, with the consent or assistance of defendant, plaintiff
58 built or commenced to build a barn on said N. E. ¼ of S. E. ¼.

6th. Denies that about the month of December, 1875, or at any other time, with the consent or knowledge of the said defendant, plaintiff commenced to build a house on the N. E. ¼ of the S. E. ¼ aforesaid, or that defendant assisted plaintiff in bringing the lumber with which said house was built, or that he, said defendant, made no objection thereto until three or four weeks' work had been done thereon; but, on the contrary, alleges that at numerous times during the summer of 1875 and prior thereto and prior to said house being commenced defendant had asserted his rights to said land in numerous conversations had with the plaintiff, and as soon as he knew that plaintiff had commenced to build said house thereon forbid him, in the presence of witnesses, and vigorously protested against plaintiff doing any work or making any improvements on said land; denies that the value of said house was $250.00 or of any other or greater value than 100 dollars, and alleges that said house was built and improvements made more than six years prior — the commencement of this suit.

7th. Denies that between the month of January, 1876, and the month of January, 1883, both inclusive, or at any other time whatever, plaintiff, with the consent of defendant, built various fences or any fence whatever on the N. E. ¼ of S. E. ¼ of sec. 9 afore-
59 said, or that plaintiff built any fence whatever thereon of the value of $350.00 or of any other or greater value than $75, and alleges that the same were built more than six years prior to the commencement of this suit.

8th. Denies that between the winter of 1875–'6 and the winter of 1881–'2, both inclusive, or at any other time, with the consent of defendant, plaintiff set out or cultivated an orchard of 250 fruit trees or any other number of fruit trees on said N. E. ¼ of S. E. ¼, and denies that the plaintiff set out any orchard of the value of $600.00, or that the same is of any other or greater value than $75.00, and alleges that the same were made more than six years prior to the commencement of this suit.

9th. Denies that about the month of January, 1877, or at any other time the said plaintiff, with the consent of defendant, built a wood-shed or chicken-house upon the N. E. ¼ of S. E. ¼ of sec. 9 aforesaid, or that the same are of the value of 75 dollars or of any other or greater value than 10 dollars, and alleges that the same were built more than six years prior to the commencement of this suit.

10th. Denies that about the month of Oct., 1879, or at any other time, with the consent of this defendant, plaintiff built a small barn or any barn whatever on said N. E. ¼ of S. E. ¼ of said sec. 9, or that the same was of the value of $50.00 or is of any other or greater value than $10.00, and alleges that the same was built more than six years prior to the commencement of this suit.

60 11th. Denies that about the month of March, 1878, or at any other time, with the consent of this defendant, plaintiff built a bridge on the said N. E. ¼ of S. E. ¼ of said sec. 9 or at any point whatever, or that the same is of the value of 50 dollars or of any value greater than 5 dollars, and alleges that the same was built more than six years prior to the commencement of this suit.

12th. Denies that about the month of July, 1881, or at any other time, with the consent of the defendant, plaintiff built a large barn or any barn whatever on the said N. E. ¼ of S. E. ¼, or that the same is of the value of 350 dollars or of any other or greater value than one hundred dollars.

13th. Denies that about the month of January, 1880, or at any other time, with the consent of this defendant, plaintiff built a smoke-house or milk-house or any house whatever upon said N. E. ¼ of S. E. ¼, or that the same are of the value of 100 dollars or of any other or greater value than twenty-five dollars.

14th. Denies that between the month of Jan., 1872, and the month of October, 1883, both inclusive, neither at nor during any other time whatever, the said plaintiff, with the consent of defendant, cleared or grubbed or prepared for cultivation about 12 acres or any other amount of land whatever upon the said N. E. ¼ of S. E. ¼; denies that during said time or during any other time whatever plaintiff has cleared, grubbed, or prepared for cultivation any
61 amount of land of said N. E. ¼ of S. E. ¼ greater than one acre, or that the value of the same is $600.00 or of any greater value than twenty dollars.

15th. Denies that between the month of January, 1875, and the month of July, 1883, or at any time whatever, with the consent of this defendant, the plaintiff planted upon the said N. E. ¼ of S. E. ¼ aforesaid small fruits of any kinds or of any amount or of any value whatever; denies that any or all of the said small fruits planted by plaintiff were of the value of $100 or of any other or greater value than $5.

16th. Denies that the orchards, fences, houses, barns, and other improvements mentioned in the plaintiff's said complaint as aforesaid are each and all of the reasonable value of the amounts alleged in the said respective allegations, or that they are each and all of any greater value than is set forth in each and all of the foregoing denials of said allegation; denies that they each or all improve and increase the value of the said N. E. ¼ of the S. E. ¼ aforesaid to the extent of the said respective amounts, to wit, in the aggregate to the amount of two thousand five hundred and twenty-five ($2,525.00) dollars, or that they enhance the said value of said N. E. ¼ of S. E. ¼ to the amount of any other or greater sum than $400.00; but, on the contrary, defendant, further answering, alleges that at all
62 the times mentioned in the said plaintiff's complaint the defendant was a settler in good faith upon said land as aforesaid, intending to claim and take the same as a pre-emption, as he has heretofore set forth; that until Dec., 1875, he was in the exclusive and sole possession thereof and had continuously each year, for three consecutive years immediately following his said settlement

thereon in 1871, cultivated and raised crops on the said N. E. ¼ of the S. E. ¼ as aforesaid; that said possession, residence, and cultivation was open, continuous, and active, and that the plaintiff well knew the same.

17th. Denies that each and all of the said improvements or any part of them, to wit, the orchards, fences, buildings, or other improvements aforesaid, were made, set out, or built by pl't'ff in good faith; denies that pl't'ff at each, all, or any of the times of making said improvements or at any other time whatever believed or had good reason or any reason whatever to believe that he had the exclusive right or any right whatever to purchase, or that he would be allowed to purchase, the said N. E. ¼ of the S. E. ¼ aforesaid; but, on the contrary, alleges that all of the said improvements aforesaid made by the said plaintiff on the said N. E. ¼ of the S. E. ¼
63 as aforesaid were made, built, and set out wrongfully, under the protest, against the wishes, and in violation of the rights of the said defendant, as the said plaintiff well knew, and with the intention of cheating and defrauding the said defendant out of his said land.

18th. Denies that defendant from the year 1871 until the month of Dec., 1875, did not claim or pretend or attempt to claim any right whatever to the said N. E. ¼ of S. E. ¼ or any part thereof, or that on divers and sundry occasions or any occasion whatever, between the years 1871 and 1875 or at any other time whatever, defendant represented to plaintiff or any other person or persons whomsoever that the said N. E. ¼ of the S. E. ¼ or any part thereof was a part of the claim of plaintiff, and denies that defendant ever represented to any person whatever that he neither had nor expected to have any interest or title in the same or any part thereof, or that he ever represented at any time whatever to the plaintiff or any other person whatever that the plaintiff or any other person whatsoever except himself had any right, title, claim, or interest whatever in or to the said N. E. ¼ of S. E. ¼; denies that defendant did in any way
64 object to plaintiff's improving the said N. E. ¼ of S. E. ¼ or holding the possession thereof, with the exception mentioned in the said complaint; but, on the contrary, alleges that at divers times and on various occasions since plaintiff's pretended settlement, in the year 1871, to the present time, and at all times during said period, defendant has objected and protested by acts and words, both in court and out of court, against the pretended claims of the plaintiff to said land and against the making of improvements upon said land by him.

19th. Denies that the greater portion of said improvements could not be removed from said land without entailing great loss or expense, but alleges that the greater portion thereof could be removed with light expense.

Defendant, further answering plaintiff's said complaint, alleges that all matters mentioned in the various allegations of the plaintiff's complaint hereinbefore answered and denied and all issues thereby tendered and made were fully tried, determined, adjudicated, and finally settled in the Land Department of the United

States in the contest between this plaintiff and defendant, set forth in counts numbered 23 and 24 of said plaintiff's complaint
65 herein, and the said N. E. ¼ of S. E. ¼ aforesaid was by the Hon. Secretary of the Interior Dep't of the United States, on the — day of ——, 1883, finally awarded to this defendant on the ground of prior settlement, continuous residence, and cultivation thereof from the — day of May, 1871, down to the date when said proof was made, as required by the pre-emption laws of the United States, and the claim of the said plaintiff herein to the said N. E. ¼ of S. E. ¼ was rejected by the said Land Department on the ground that he had completely failed in the matter of settlement, residence, and cultivation, as required by said pre-emption laws of the United States, and that for more than three years immediately following said alleged settlement of plaintiff herein, Sept. 7, 1871, he, the plaintiff, had failed to reside upon or cultivate the said land continuously or at all.

20th. Defendant denies that the said decision of the said Secretary of the Interior, mentioned in plaintiff's complaint, awarding said land to the defendant herein was based only upon the ground that the defendant was the oldest settler upon the public land, and that he ought to have the right to include a full claim of 160 acres of land as his claim, or that the question as to how far the defendant should be estopped from asserting any claim to the said N.
66 E. ¼ of S. E. ¼ by reason of his said declarations, acts, and doings, as in this complaint before stated, never were decided or determined by the said district land officers or Commissioner of the General Land Office, or *that* the Acting Secretary of the Interior in making of the said decisions in the matter of the said contest but alleges that the said plaintiff in this suit did in the said contest before the U. S. Land Department attempt to show the acts, declarations, and doings alleged in the complaint herein for the purpose for which the same are alleged in said complaint, and to establish his right to pre-empt said N. E. ¼ of S. E. ¼, and the same was passed upon by the acting Secretary of the Interior in said contest and decided adversely to plaintiff herein, said contestant.

21st. Denies that at all times or at any time since the 1st day of December, 1871, until and including the date of the verification of the complaint in this suit, the said plaintiff has been in the quiet or peaceable or sole possession of said N. E. ¼ S. E.¼; denies that the plaintiff now is or always has been or ever has been ready or willing to pay to defendant the purchase price paid by him for the said tract of land.

22nd. That defendant alleges the value of the rents, issues, and profits of said N. E. ¼ of S. E. ¼ is one hundred dollars per annum, and the plaintiff has since December, 1875, to the summer
67 of 1885, inclusive, wrongfully received the same and converted the same to his own use and benefit.

Wherefore defendant prays a decree of this court—

1st. For the recovery of the possession of the said N. E. ¼ of S. E. ¼ of section —, t'p 24 S., of R. 12 W.

3rd. For his costs and disbursements of this suit.

4th. For such other and further relief as to the court shall seem just and equable.

C. B. WATSON AND CRAWFORD & LOCKHART,
Defendant's Attorneys.

STATE OF OREGON, } *ss:*
County of Coos, }

I, H. W. Sanford, being duly sworn, say I am the defendant making the foregoing answer; that I have heard said answer read and know the contents thereof and believe the same to be true.

H. W. SANFORD.

Subscribed and sworn to before me this 26th day of September, 1885.

J. J. LAMB, *Co. Clerk,*
By R. H. LOWE, *Deputy.*

Indorsements: In the circuit court of the State of Oregon for the county of Coos. C. W. Sanford *vs.* H. W. Sanford. Answer. Filed Sept. 26, 1885. J. J. Lamb, clerk. C. B. Watson and Crawford & Lockhart, attorneys for defendant.

68 In the Circuit Court of the State of Oregon in and for the County of Coos.

C. W. SANFORD, Plaintiff,
vs.
H. W. SANFORD, Defendant.

Plaintiff above named, replying to defendant's answer herein, denies that on the — day of May, 1871, or at any other time defendant settled upon or improved the land designated in the surveys of the United States as the N. E. ¼ of the S. E. ¼ of section 9, in township 24 south, of range 12 west, of the Willamette meridian, or any part thereof; denies that ever since the said date or at any time the said defendant or his family or any member thereof has or have resided upon, cultivated, or improved the said N. E. ¼ of S. E. ¼ or any part thereof; denies that the said defendant was ever in possession of the said N. E. ¼ of S. E. ¼ or any part thereof; denies that the house mentioned in the 4th subdivision of defendant's answer was built at the joint expense of plaintiff and defendant under a partnership or any other agreement or otherwise; denies that there was any understanding or agreement between plaintiff and defendant that if the said house should fall within defend-
ant's pre-emption claim it should be removed therefrom;
69 denies that during the summer of 1875 or prior thereto or at any time, except as in plaintiff's complaint herein alleged, defendant asserted his right to the said N. E. ¼ of S. E. ¼ or any part thereof; denies that defendant, in the presence of witnesses or otherwise, ever forbid plaintiff building a house on the said N. E. ¼ of S. E. ¼, except as in plaintiff's complaint herein alleged; denies

that defendant ever protested against plaintiff's doing work or making improvements on the said N. E. ¼ of S. E. ¼ or any part thereof; denies that defendant was ever a settler upon the said N. E. ¼ of S. E. ¼ or any part thereof, or was ever in possession thereof, or cultivated the said N. E. ¼ of S. E. ¼ or any part thereof, or raised a crop or crops thereon; denies that the improvements made by the plaintiff on the said N. E. ¼ of S. E. ¼, as set forth in plaintiff's complaint herein, or any part thereof were made, built, or set out wrongfully, or under protest from, or against the wishes of, or in violation of the rights of, the said defendant, or with the intention of cheating or defrauding the said defendant out of any land or anything whatsoever or at all; denies that at any time defendant objected or protested, by act or words, either in court or out of court, or at all, except as in plaintiff's complaint herein alleged, against plaintiff's claims to the said N. E. ¼
70 of S. E. ¼ or against his making improvements thereon; denies that the matters mentioned in the allegations in plaintiff's complaint herein or any of them or all or any of the issues tendered thereby were fully or at all tried, determined, adjudicated, or finally settled, or settled at all in the contest in the Land Department of the United States, set forth in plaintiff's complaint herein, or in any contest or at all in the said Land Department; denies that the said N. E. ¼ of the S. E. ¼ was, on the — day of ——, 1883, or at any time, *was* by the Hon. Secretary or any other officer of the Interior or any other Department of the United States, awarded to the said defendant on the ground of prior settlement, continuous residence, or cultivation, or any other ground than that alleged in plaintiff's complaint herein; denies that plaintiff's claim to the said N. E. ¼ of S. E. ¼ was rejected by the said Land or any other Department on the ground that plaintiff had failed in the matter of settlement, residence, or cultivation, as required by the pre-emption or any other laws of the United States, or on the ground that for more than three years or for any time following the settlement of plaintiff on the said N. E. ¼ of S. E. ¼, September 1st, 1871, or any other time, plaintiff had failed to reside upon or cultivate the said land; denies that in the said contest or any contest be-
71 fore the United States Land Department or any Department the said plaintiff showed or attempted to show the acts, declarations, or doings alleged in plaintiff's complaint herein or any part thereof, for the purpose for which the same are alleged in plaintiff's said complaint or otherwise; denies that the said acts, declarations, or doings, or any part thereof, were passed upon by the acting Secretary or any other officer of the Interior or any other Department, either adversely to plaintiff or otherwise; denies that the rents, profits, and issues of the said N. E. ¼ of the S. E. ¼, without the improvements made thereon by plaintiff, are worth the sum of one hundred dollars per annum or any sum greater than twenty dollars per annum; denies that the plaintiff's possession of the said land was ever wrongful.

HAZARD & WILSON,
Attorneys for Plaintiff.

STATE OF OREGON, } ss:
County of Coos, }

I, Cyrenus W. Sanford, being first duly sworn, say that I am the plaintiff named in the foregoing reply; that I know the contents thereof and believe the same to be true.

C. W. SANFORD.

Subscribed and sworn to before me this 26th day of September, A. D. 1885.

[SEAL.] SHEDDEN F. WILSON,
Notary Public for Or.

Indorsements: In the circuit court of the State of Oregon for the county of Coos. C. W. Sanford, plaintiff, *vs.* H. W. Sanford, defendant. Reply. Filed Sept. 26th, 1885. J. J. Lamb, clerk. Hazard & Wilson, att'ys for pl't'ff.

72 Be it remembered that at a regular term of the circuit court of the State of Oregon in and for the county of Coos, began and held at the court-house, at Empire City, on the 21st day of September, 1885, at which were present the Hon. R. S. Bean, judge; J. W. Hamilton, district att'y; I. Hacker, sheriff; J. J. Lamb, clerk; then on the 26th day of September, 1885, being the 6th judicial day of said term, when, among others, the following proceedings were had, to wit:

In the Circuit Court of the State of Oregon for the County of Coos.

C. W. SANFORD, Plaintiff, }
vs.
H. W. SANFORD, Defendant. }

The above cause coming on to be heard upon the defendant's application for continuance, the plaintiff appearing by Hazard & Wilson, his attorneys, and the defendant above named by Crawford & Lockhart and C. B. Watson, his attorneys, and the court being fully advised in the premises, it is ordered by the court that said continuance be allowed if the defendant consent to the following terms, to wit: That the plaintiff shall have the right to the use, occupation, and rents and profits of the N. E. ¼ of S. E. ¼ of section 9, township 24 S., R. 12 west, of the Willamette meridian, during the pendency of the suit; and, no matter what the result of
73 this litigation shall be, that plaintiff shall have the right to retain the possession of said land for such time as the court shall deem reasonable for the purpose of cultivating and removing any crop he may have on said land at the time this suit shall be heard and determined, and that defendant pay to plaintiff one-half of the costs and disbursements for plaintiff's witnesses at this term of court, and that the plaintiff make out his cost bill therefor under oath and submit the same to defendant's attorneys within five days from the making of this order, and that said defendant pay the

plaintiff or his attorneys said one-half of said witness fees within five days thereafter, and that if the said defendant shall prevail in this suit, then that he shall have the right to tax the amount so paid in his cost bill against plaintiff; and, the defendant in open court consenting to said terms, it is ordered by the court that this suit be continued until next term of this court, upon the terms above mentioned.

(Journal signed) R. S. BEAN, *Judge.*

74 & 75 Be it remembered that at a regular term of the circuit court of the State of Oregon in and for the county of Coos, began and held at the court-house, at Empire City, on the 24th day of May, 1886, at which were present the Hon. R. S. Bean, judge; J. W. Hamilton, district attorney; I. Hacker, sheriff; J. J. Lamb, clerk; then on the 2nd day of June, 1886, being the 7th judicial day of said term, when, among others, the following proceedings were had, to wit:

In the Circuit Court of the State of Oregon for the County of Coos.

C. W. SANFORD, Plaintiff,
vs.
H. W. SANFORD, Defendant. } Cross-Bill in Equity.

The above cause coming on to be heard, the plaintiff appearing by Hazard & Wilson, his attorneys, and defendant by Crawford & Lockhart, his att'ys; and thereupon, by consent of parties, this cause was tried before the court on oral testimony, and the court, not being fully advised as to what decree should be made, takes the same under advisement.

(Journal signed) R. S. BEAN, *Judge.*

76 In the Circuit Court of the State of Oregon for Coos County.

C. W. SANFORD, Pl'ff,
vs.
H. W. SANFORD, Def't. } Cross-Bill in Equity.

The above-entitled suit coming on for trial at the regular May term, 1886, of the above-entitled court, plaintiff appearing by Hazard & Wilson, his attorneys, and defendant by Crawford and Lockhart, his attorneys, the court, after hearing the evidence and argument of counsel, being in doubt in the premises, reserved said cause for further consideration; and now, having fully considered the same, finds the following facts:

(1.)

That about May 1, 1871, defendant, H. W. Sanford, settled upon unsurveyed Government land in Coos county, Oregon, with the intention of taking 160 acres thereof as a pre-emption claim as soon as the same was surveyed.

(2.)

That on or about Sept. 1st, 1871, at the request and solicitation of defendant, plaintiff, C. W. Sanford, moved from the State
77 of California, where he was then residing, and settled upon the land in dispute in this case, the same being then unsurveyed, with the intention of taking the same as a pre-emption claim as soon as surveyed, and has ever since said date resided upon and cultivated and improved said lands.

(3.)

That said settlement and cultivation of plaintiff on said land was made by plaintiff with the knowledge and consent and at the request of defendant, said defendant pointing the same out to plaintiff and aiding and assisting him in the improvement of the same.

(4.)

That at no time has defendant resided upon or cultivated or improved said land or any part thereof.

(5.)

That at the time of the settlements of plaintiff and defendant, as mentioned in findings Nos. 1 and 2, it was supposed that defendant's claim would include 160 acres of Government land; but during the summer of 1872 it was ascertained that eighty acres thereof
78 would belong to the State of Oregon, for common-school purposes, as soon as surveyed.

(6.)

That in 1879 the land settled upon by plaintiff and defendant was duly surveyed by the United States and the approved plat thereof filed in the land office at Roseburg, Oregon, on July 31st, 1879; wherein it was ascertained and determined that the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of sec. 9, T. 24 S., of R. 12 W., was a portion of the land settled upon by plaintiff at the request and with the knowledge and consent of defendant, as mentioned, findings Nos. 2 and 3.

(7.)

That on Sept. 9th, 1879, plaintiff filed in the Roseburg land office his declaratory statement, covering the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of sec. 9, T. 24 S., of R. 12 W., and on Sept. 27th, 1879, defendant filed his declaratory statement covering the E. $\frac{1}{2}$ of S. W. $\frac{1}{4}$, the N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, and S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of said section 9.

(8.)

That on Oct. 14th, 1880, said defendant was granted permission by the Commissioner of the General Land Office to amend his declaratory statement so as to include therein the N. E. $\frac{1}{4}$ of the
79 S. E. $\frac{1}{4}$ of sec. 9, T. 24 S., of R. 12, that being the land in dispute in this case.

(9.)

That between the date of the settlement on the N. E. ¼ of S. E. ¼ of sec. 9, being the land in dispute, and the winter of 1875–'6, plaintiff, by the knowledge and consent and at the request and with the assistance of defendant, made valuable improvements on said land, in building houses and barns and clearing and improving the same, of the value of $500, it being then understood by plaintiff and defendant that said land was a part of plaintiff's claim and would be taken by him as a pre-emption as soon as the same was surveyed, and said improvements were made with that object in view, as defendant very well knew.

(10.)

That about Jan'y, 1876, defendant first claimed any interest in the land in dispute, and at that time objected to plaintiff's completing the construction of a dwelling-house upon said land, saying the land belonged to him; but that is the first and only time defendant ever objected to plaintiff's occupying and improving said land prior to the 2nd day of February, 1884, except in the commencement of the contest in the land office in 1882.

80 (11.)

That prior to the arrival in Oregon of plaintiff, as mentioned in finding No. 2, defendant employed and procured one Walker to hold the land in dispute for plaintiff, so as to prevent other parties from settling upon the same.

(12.)

That from the time of the settlement on the land in dispute by plaintiff to Jan'y, 1876, defendant made no objection to plaintiff's holding or occupying said land, nor did he claim any right to said land, but repeatedly stated to plaintiff and other parties that the land belonged to plaintiff and was a part of his pre-emption claim.

(13.)

The decision of the Secretary of the Interior of Aug. 30th, 1883 awarding the land to defendant, was made and based upon the fact that in the opinion of that officer defendant was the first settler upon said land and entitled to the same by reason of prior residence and cultivation.

(14.)

81 It is not true, as alleged in the answer, that plaintiff should move the house built by him in 1872 if the same should fall within defendant's pre-emption claim, or that there was any agreement concerning the moving of said house whatever.

(15.)

That between Jan'y, 1872, and Jan'y, 1883, plaintiff made valuable and permanent improvements, with the knowledge of defendant, on the land in dispute, of the reasonable value of $1,800.00.

(16.)

That the rents and profits of said land during the time the same has been occupied by plaintiff, exclusive of the use of the improvements made thereon by plaintiff ,is reasonably worth the sum of $250.00.

(17.)

That at the time of the settlement upon the land in dispute by plaintiff, as mentioned in finding No. 2, he was a qualified preemptor under the laws of the United States.

As conclusions of law, I find that plaintiff is entitled to a decree of this court perpetually enjoining and restraining the pro-
82 ceedings at law in the action of ejectment mentioned in the complaint.

(2.)

The defendant holds the legal title to the land in dispute in trust for the plaintiff.

(3.)

That plaintiff is entitled to a decree requiring defendant to convey said land to plaintiff within twenty days from this date, and in case he fail so to do that said decree stand in place of such conveyance.

Dated Sept. 20th, 1886.

R. S. BEAN, *Judge.*

Indorsements: In the circuit court of the State of Oregon in and for the county of Coos. C. W. Sanford, pl'ff, *vs.* H. W. Sanford, def't. Findings of facts and conclusion of law. Filed September 20th, 1886. J. J. Lamb, clerk.

In the Circuit Court of the State of Oregon in and for the County of Coos.

C. W. SANFORD, Plaintiff,
vs.
H. W. SANFORD, Defendant. } Cross-Bill in Equity.

83 Now comes the plaintiff in the above-entitled suit and moves the court to make the following additional findings of fact in the said suit, to wit:

1st. That the amended filing of the defendant herein mentioned in the 22nd allegation in plaintiff's complaint herein, whereby the said defendant was enabled to change his original entry in such a manner as to include therein the northeast quarter of the southeast quarter of section 9, in township 24 south, of range 12 west, the land in controversy in this suit, was allowed on the *ex parte* affidavits of the said defendant and his two witnesses, and without any notice whatever to the said plaintiff; that it was not shown by the said affidavits or either of them that the said plaintiff was in possession

of or had any improvements upon the said land in controversy; but, on the contrary, it was alleged in the said affidavit of defendant and of one of his said witnesses that the said defendant's house and other valuable improvements belonging to the said defendant were situated upon the said land; that at the time the said defendant and his said witnesses made the said affidavits the said plaintiff was residing on the said land in controversy, and had a house and other valuable improvements thereon, worth several hundred dol-
84 lars, and the said defendant was well aware that such was the case, whereas the said defendant had no improvements of any kind whatsoever on the said land in controversy; that the Commissioner of the General Land Office was thereby imposed upon and was induced to allow the defendant to amend his said filings in manner aforesaid.

2nd. That at the time the defendant settled upon unsurveyed land, as mentioned in the first finding of fact herein, he intended to take and hold as part of his pre-emption claim eighty acres of land which, in the year 1872, he ascertained would be a part of a sixteenth section, and that notwithstanding the defendant was informed and well knew that he could hold the said eighty acres of land as a part of his pre-emption claim by virtue of the fact that he had made settlement thereon prior to survey, that he elected to purchase and did purchase said eighty acres of land from the State of Oregon, and that he never asserted any claim to the land in controversy until long after that time; and the said plaintiff further moves the court to make the following additional conclusions of law, to wit:

1st. That this court cannot review the action of the land office, however erroneous, if fairly and regularly had, upon the mere question of fact as to which was the prior settler upon or who first cultivated the land in controversy, the said plaintiff or the said defendant.

85 2nd. That the defendant is entitled to receive from the plaintiff the sum of fifty dollars, being the amount paid by the said defendant to the United States as the purchase price of the land in controversy.

3rd. That the plaintiff is entitled to recover judgment against the defendant for his costs and disbursements in this suit, and that the said sum of fifty dollars, or so much thereof as may be necessary, should be credited upon the said judgment, and if the said judgment does not amount to fifty dollars, the balance remaining shall be paid to the clerk of this court for the said defendant.

HAZARD & WILSON,
Attorneys for Pl'ff.

Indorsements: In the circuit court of the State of Oregon in and for the county of Coos. C. W. Sanford *vs.* H. W. Sanford. Motion for additional findings of fact and of law. Filed September 22nd, 1886. J. J. Lamb, clerk. Hazard & Wilson, attorneys for plaintiff.

86 In the Circuit Court of the State of Oregon in and for the County of Coos.

C. W. SANFORD, Plaintiff,
vs.
H. W. SANFORD, Defendant. } Cross-Bill in Equity.

The plaintiff in this suit having duly filed his motion asking the court to make certain other findings of fact and conclusions of law herein in addition to the findings of fact and conclusions of law already, to wit, on the 20th day of September, A. D. 1886, duly made and filed in this suit by the judge of this court, and it appearing to the court on the examination and hearing of said motion that it is right and proper that such additional findings of fact and conclusions of law should be made, it is considered that the said motion be, and same hereby is, allowed, and the court makes the following findings of fact and conclusions of law in this suit, to wit:

87 *Findings of Fact.*

1st. That the amended filing of the defendant herein mentioned in the 22nd allegation in plaintiff's complaint herein, whereby the said defendant was enabled to change his original entry in such a manner as to include therein the northeast quarter of the southeast quarter of section nine, in township twenty-four south, of range twelve west, the land in controversy in this suit, was allowed on the *ex parte* affidavits of the said defendant and his two witnesses, and without any notice whatever to the said plaintiff; that it was not shown by the said affidavits or either of them that the said plaintiff was in possession of or had any improvements upon the said land in controversy; but, on the contrary, it was alleged in the said affidavit of defendant and of one of his said witnesses that the said defendant's house and other valuable improvements belonging to the said defendant were situated upon the said land; that at the time the said defendant and his said witnesses made the said affidavits the said plaintiff was residing on the said land in controversy, and had a house and other valuable improvements thereon, worth several hundred dollars, and the said defendant was well aware that such was the case, whereas the said defendant had no
88 improvements of any kind whatsoever on the said land in controversy; that the Commissioner of the General Land Office was thereby imposed upon and induced to allow the defendant to amend his said filing in manner aforesaid.

2nd. That at the time the defendant settled upon unsurveyed land, as mentioned in the first finding of fact herein, he intended to take and hold as part of his pre-emption claim eighty acres of land which in the year 1872 he ascertained would be a part of a sixteenth section, and that notwithstanding the defendant was informed and well knew that he could hold the said eighty acres of land as a part of his pre-emption claim by virtue of the fact that he made settlement thereon prior to survey, that he elected to purchase and did

purchase said eighty acres of land from the State of Oregon, and that he never asserted any claim to the land in controversy until long after that time.

Conclusions of Law.

1st. That this court cannot review the action of the land office, however erroneous, if fairly and regularly had, upon the mere question of fact as to which was the prior settler upon or who first cultivated the land in controversy, the said plaintiff or the said defendant.

89 2nd. That the defendant is entitled to receive from the plaintiff the sum of fifty dollars, being the amount paid by the said defendant to the United States as the purchase price of the land in controversy.

3rd. That the plaintiff is entitled to recover judgment against the defendant for his costs and disbursements in this suit, and that the said sum of fifty dollars, or so much thereof as may be necessary, should be credited upon the said judgment, and if the said judgment does not amount to fifty dollars the balance remaining shall be paid to the clerk of this court for the said defendant.

Dated at Empire City, Oregon, this 22nd day of September, A. D. 1886.

R. S. BEAN, *Judge.*

Indorsements: In the circuit court of the State of Oregon in and for the county of Coos. C. W. Sanford *vs.* H. W. Sanford. Additional findings of fact and conclusions of law. Filed September 22nd, 1886. J. J. Lamb, clerk.

90 Be it remembered that at a regular term of the circuit court of the State of Oregon in and for the county of Coos, began and held at the court-house, at Empire City, on the 20th day of September, 1886, at which were present the Hon. R. S. Bean, judge; J. W. Hamilton, district att'y; L. Harlocker, sheriff; J. J. Lamb, clerk; then on the 22nd day of September, 1886, being the 3rd judicial day of said term, when, among others, the following proceedings were had, to wit:

In the Circuit Court of the State of Oregon for the County of Coos.

C. W. SANFORD, Plaintiff,
vs.
H. W. SANFORD, Defendant. } Cross-Bill in Equity.

In accordance with the foregoing findings of fact and conclusions of law heretofore made by the court herein and filed the 20th day of September, 1886, and the additional findings of fact and conclusions of law heretofore made by the court herein and filed the 22nd day of September, 1886, and in accordance with the facts admitted upon the pleadings herein, it is ordered, adjudged, and decreed by

the court that the defendant herein be, and is hereby, perpetually enjoined and restrained from ever prosecuting or proceeding at law in the action of ejectment mentioned in the complaint of
91 plaintiff herein; and it is further ordered, adjudged, and decreed by the court that the defendant herein holds the legal title to the northeast quarter of the southeast quarter of section nine, in township twenty-four south, of range twelve west, of the Willamette meridian, in Coos county and State of Oregon, the land in controversy herein, in trust for the plaintiff herein, and that defendant herein be, and hereby is, required to convey said land to the plaintiff herein within twenty days from the date of this decree, and in case he fail so to do, then in that case this decree shall stand and operate as such conveyance of said land to plaintiff herein; and it is further ordered, adjudged, and decreed by the court that the plaintiff herein have and recover from and off of the defendant herein his costs and disbursements in this suit, and that said defendant be credited upon said judgment, for costs and disbursements, with the sum of fifty dollars, the same being the purchase price paid by him for said land; and if said judgment for costs and disbursements shall not amount to the sum of fifty dollars, then that the plaintiff
92 pay to the clerk of this court the difference between the amount of the costs and disbursements herein and said sum of fifty dollars, to be paid to defendant herein on demand by said clerk, and that execution issue for the enforcement of this decree, and that defendant have sixty days in which to prepare and file bill of exceptions in this case.

(Journal signed) R. S. BEAN, *Judge.*

In the Circuit Court of the State of Oregon for the County of Coos.

C. W. SANFORD, Plaintiff,
vs.
H. W. SANFORD, Defendant.

It is hereby stipulated by and between the attorneys for the respective parties herein that the time allowed by the judge of the above-entitled court for defendant to file a bill of exceptions herein by defendant be, and the same is hereby, extended to the 20th day of December, 1886.

Dated Nov. 20th, A. D. 1886.

HAZARD & WILSON,
Attorneys for Plaintiff.
A. M. CRAWFORD,
Attorney for Defendant.

Indorsements: In the circuit court of the State of Oregon
93 for the county of Coos. C. W. Sanford, plaintiff, *vs.* H. W. Sanford, defendant. Stipulation to extend the time to file bill of exceptions. Filed November 27th, 1886. J. J. Lamb, clerk. Hazard & Wilson, plaintiff's attorneys. A. M. Crawford, defendant's attorney.

In the Circuit Court of the State of Oregon for the County of Coos.

C. W. SANFORD, Plaintiff,
vs.
H. W. SANFORD, Defendant.

A bill of exceptions having on the 6th day of December, 1886, been duly presented to me for allowance in the above-entitled action, and it being necessary to have the same rewritten, it is ordered that the time for filing same be, and the same is hereby, extended until Feb. 15th, 1887.

Dated December 16th, 1886.

R. S. BEAN, *Judge.*

Filed and entered Dec. 22nd, 1886.

J. J. LAMB, *Clerk.*

Indorsements: Circuit court, Coos county. Sanford *vs.* Sanford. Order extending time for filing bill of exceptions. Filed and entered December 22nd, 1886. J. J. Lamb, clerk.

94 In the Circuit Court of the State of Oregon for the County of Coos.

C. W. SANFORD, Plaintiff,
vs.
H. W. SANFORD, Defendant.
Cross-Bill in Equity.
Notice of Appeal.

To C. W. Sanford, plaintiff above named, and S. H. Sanford and S. F. Wilson (Hazard & Wilson), his attorneys:

You and each of you are hereby notified that H. W. Sanford, defendant in the above-entitled cause, hereby appeals from the judgement and decree rendered in the above-entitled court on the 22nd day of September, 1886, in the above-entitled cause in favor of said plaintiff and against said defendant, ordering, adjudging, and decreeing that the defendant herein is hereby perpetually enjoined and restrained from ever prosecuting or proceeding at law in the action of ejection mentioned in the complaint of plaintiff herein; and further ordering, adjudging, and decreeing that H. W Sanford, the defendant herein, holds the legal title to the northeast quarter of the southeast quarter of section nine, in township twenty-four south, of range twelve west, of the Willamette meridian,
95 in Coos county, Oregon, being the land in controversy herein, in trust for the plaintiff herein, and that defendant be, and hereby is, required to convey said land to the plaintiff herein within twenty days from the date of said decree, and in case he fail so to do, then and in that case said decree shall stand and operate as such conveyance of said land to plaintiff herein; and further ordering, adjudging, and decreeing that plaintiff herein recover from and of the defendant herein his costs and disbursements in this suit, and that said defendant be credited upon said judgment for costs and disbursements with the sum of fifty dollars,

the same being the purchase price paid by him for said land, and if such judgment for costs and disbursements shall not amount to the sum of fifty dollars, then that plaintiff pay to the clerk of this court the difference between the amount of the costs and disbursements herein and said sum of fifty dollars, to be paid to defendant on demand by the clerk, and that execution issue for the enforcement of said judgment and decree, to the supreme court of the State of Oregon, and from the whole of said judgment and decree of said circuit court of the State of Oregon for the county of Coos made and entered in said cause.

And H. W. Sanford, defendant and appellant, hereby specifies the following as the grounds of error upon which he intends
96 to rely upon the appeal, to wit:

I.

That the circuit court erred in overruling defendant's motion to strike out portions and different portions of plaintiff's complaint.

II.

That the circuit court erred in overruling defendant's demurrer to plaintiff's complaint.

III.

That the circuit court erred in overruling defendant's demurrer to different portions of plaintiff's complaint.

IV.

That the circuit court erred in not dismissing plaintiff's complaint or cross-bill in equity upon the grounds that the same did not state facts sufficient to constitute a cause of suit, as pointed out and specified in defendant's demurrer and motion.

V.

That the circuit court erred in dismissing defendant's action at law to recover possession of the premises in controversy herein and awarding plaintiff herein a judgment against defendant herein for his costs and disbursements in said action.

VI.

That the circuit court erred in admitting as evidence on the trial of said cause, after the same had been duly objected to by defendant, the testimony taken before the Land Department of the United States in a land contest under the pre-emption laws of the
97 United States, between plaintiff and defendant herein, to ascertain the rights of said parties under said pre-emption law to the land in controversy in this suit, said testimony being offered by plaintiff.

VII.

That the circuit court erred in admitting as evidence on the trial of said cause, after the same had been duly objected to by defendant

and over defendant's objections, the affidavits and testimony taken before the Land Department of the United States under the pre-emption laws of the United States, under which defendant was allowed to amend his pre-emption filing for the land in controversy in this suit, said testimony being offered by plaintiff upon said trial.

VIII.

That the circuit court erred in admitting as evidence on the trial of said cause, after the same had been duly objected to by defendant and over defendant's objections, the judgment-roll and deposition of defendant in a suit in equity between plaintiff and defendant herein, begun and tried in the circuit court of the State of Oregon for the county of Coos, entitled C. W. Sanford *vs.* H. W. Sanford, and in equity, for a dissolution of partnership and accounting, said judgment-roll and deposition being offered by plaintiff upon said trial.

IX.

98 That the circuit court erred in admitting as evidence on the trial of said cause, after the same had been duly objected to by defendant and over defendant's objections, the pleadings and decree in an action at law between plaintiff and defendant, commenced and tried in justice's court for Marshfield precinct, Coos county, Oregon, entitled C. W. Sanford *vs.* H. W. Sanford, action at law to recover possession of personal property, said testimony being offered by plaintiff.

X.

That the circuit court erred in finding No. 1 of his findings of fact in finding that C. W. Sanford, plaintiff herein, settled upon unsurveyed Government lands of the United States in Coos county, Oregon, about May 1st, 1871.

XI.

That — circuit court erred in his finding of fact No. 2 herein in finding that C. W. Sanford, plaintiff herein, about September 1st, 1871, settled upon the land in controversy with the intention of taking the same as a pre-emption claim as soon as surveyed, and has ever since said date resided upon, cultivated, and improved said lands.

XII.

That the circuit court erred in finding No. 3 of his findings of fact in finding that the settlement and cultivation and residence of C. W. Sanford, plaintiff herein, on the land in controversy from about September 1st, 1871, to the date of the trial of this suit was with knowledge, consent, and request of defendant.

99 XIII.

That the circuit court erred in his findings of fact No. 4 in finding that at no time has defendant resided upon or cultivated or improved said land or any part thereof.

XIV.

That the circuit court erred in his findings of fact No. 6 in finding that from the approved plat of survey being filed in the United States land office at Roseburg, Oregon, on July 30th, 1879, wherein it was ascertained and determined that the N. E. ¼ of S. E. ¼ of sec. 9, T. 24 S. 1, of R. 12 W., of Will. mer., was a portion of the land settled upon by plaintiff.

XV.

That the circuit court erred in finding No. 9 in his findings of fact in finding that between the date of plaintiff's settlement on the N. E. ¼ of the S. E. ¼ of section 9, being the land in dispute, and the winter of 1875–'6 plaintiff, by the knowledge and consent and at the request and with the assistance of defendant, made valuable improvements on said land, in building houses and barns and clearing and improving the same, of the value of $500.00, it being then understood by plaintiff and defendant that said land was a part of plaintiff's claim as soon as the same was surveyed, and said improvements were made with that object in view, as defendant very well knew.

100

XVI.

That the circuit court erred in his findings of fact in his finding No. 10, filed herein.

XVII.

That the circuit court erred in all his findings of fact in findings Nos. 11, 12, & 13, filed herein.

XVIII.

That the circuit court erred in all his findings of fact contained in additional finding No. 1, filed herein.

XIX.

That the circuit court erred in all of his findings of fact contained in additional finding of fact No. 2, filed herein.

XX.

That the circuit court erred in his conclusions of law in his finding No. 1, which finding No. 1 is in the following words, to wit: "I find that plaintiff is entitled to a decree of this court perpetually enjoining and restraining the proceedings at law in the action of ejectment mentioned in the complaint;" that said conclusion is not supported by the findings of fact made and filed herein or by any of them.

XXI.

That the circuit court erred in his conclusion of law No. 2, filed herein, which said conclusion No. 2 is in the following words: "That plaintiff holds the legal title to the land in dispute in trust for the plaintiff."

101 That said conclusion is not supported by the findings of fact made and filed herein or by any of them.

XXII.

That the circuit court erred in his conclusion of law No. 3, filed herein, which conclusion is in the following words: "That plaintiff is entitled to a decree requiring defendant to convey said land to plaintiff within twenty days from this date, and in case he fail so to do, that said decree stand in place of such conveyance."

That said conclusion is not supported by the findings of fact made and filed herein, or by any of them.

XXIII.

That the circuit court erred in his additional conclusion of law No. 2, made and filed herein, which said conclusion reads as follows, to wit:

"That the defendant is entitled to receive from the plaintiff the sum of fifty dollars, being the amount paid by the said defendant to the United States as the purchase price of the lands in controversy."

That said conclusion is not supported by the findings of fact made and filed herein or by any of them.

XXIV.

102 That the circuit court erred in his additional conclusion of law No. 3, made and filed herein, which said conclusion reads as follows, to wit:

"That plaintiff is entitled to recover judgment against the defendant for his costs and disbursements in this suit, and that the said sum of fifty dollars, or so much thereof as may be necessary, should be credited upon said judgment, and if said judgment does not amount to fifty dollars the balance remaining shall be paid to the clerk of this court for the said defendant."

That said conclusion is not supported by the findings of fact filed herein or by any of them.

XXV.

That the circuit court erred in rendering the decree herein in favor of plaintiff and against defendant; which said decree reads as follows, to wit:

"C. W. SANFORD, Plaintiff,
vs.
H. W. SANFORD, Defendant.

In accordance with the foregoing findings of fact and conclusion of law, heretofore made and filed on the 20th day of September, 1886, and the additional findings of fact and conclusions of law, heretofore made by the court herein and filed the 22nd day of September,

1886, and in accordance with the facts admitted upon the
103 pleadings herein, it is ordered, adjudged, and decreed by the court that defendant herein be, and is hereby, perpetually enjoined and restrained from ever prosecuting or proceeding at law in the action of ejectment mentioned in the complaint of plaintiff herein.

And it is further ordered, adjudged, and decreed by the court that the defendant herein holds the legal title to the northeast quarter of southeast quarter of section nine, in township twenty-four south, of range twelve west, Willamette meridian, in Coos county, State of Oregon, the land in controversy herein, in trust for the plaintiff herein; and defendant herein be, and hereby is, required to convey said land to the plaintiff herein within twenty days from the date of this decree; and in case he fail so to do, then and in that case this decree shall stand and operate as such conveyance of said land to plaintiff herein; and it is further ordered, adjudged, and decreed by the court that the plaintiff herein have and recover from and off of the defendant herein his costs and disbursements in this suit, and that said defendant be credited upon said judgment for costs and disbursements worth the sum of fifty
104 dollars, the same being the purchase price paid by him for said land; and if said judgment for costs and disbursements shall not amount to the sum of fifty dollars, then that the plaintiff pay to the clerk of this court the difference between the amount of the costs and disbursements herein and said sum of fifty dollars, to be paid to defendant herein on demand by said clerk, and that execution issue for the enforcement of said decree, and that defendant have sixty days in which to prepare and file bill of exceptions in this case."

That said decree is not supported by the findings of fact and conclusion of law or by any of them.

XXVI.

That the circuit court erred in not finding and giving a decree in favor of defendant.

Dated this 17th day of February, 1887.

A. M. CRAWFORD,
Attorney for Defendant and Appellant.

Indorsements.

STATE OF OREGON, } ss:
County of Coos, }

I hereby certify that I received the within notice of appeal
105 on the 18th day of February, A. D. 1887, and that I served the same in Coos county, in the State of Oregon, by delivering in person to S. F. Wilson, on the 18th day of February, 1887, one of the attorneys for the plaintiff, a true copy of the original notice of appeal, certified to be such by A. M. Crawford, attorney for the said defendant and appellant.

Dated this 18th day of February, A. D. 1887.

L. HARLOCKER, *Sheriff.*

2nd indorsement: In the circuit court of the State of Oregon for Coos county. C. W. Sanford, plaintiff, *vs.* H. W. Sanford, defendant. Notice of appeal. Filed February 18th, 1887. J. J. Lamb, clerk. A. M. Crawford, att'y for def't and app'l't.

106 STATE OF OREGON, }
County of Coos. }

I, J. J. Lamb, county clerk and *ex officio* clerk of the circuit court for said Coos county, Oregon, hereby certify that I have compared the foregoing copy of the judgment-roll and notice of appeal in the case of C. W. Sanford, plaintiff, *vs.* H. W. Sanford, defendant, with the original pleadings, orders, papers, and journal entries that constitute such judgment-roll and with the original notice of appeal, all now on file in my office, and that the same is a correct transcript therefrom and of the whole of such originals constituting such judgment-roll as aforesaid, together with all the indorsements thereon; and I further certify that on the 23rd day of February, A. D. 1887, the said H. W. Sanford, as appellant, duly filed with me as clerk of the said circuit court his undertaking on appeal in the said case, with S. R. Crawford and R. Main as sureties, no amount being specified in the said undertaking, and the same being given for an appeal and a stay of proceedings.

In witness whereof I have hereunto set my hand and affixed the seal of the said circuit court this 26th day of February, A. D. 1887.

J. J. LAMB,
Clerk of the Circuit Court for Coos County, Oregon.

Clerk's fees, $50.00.

107 Be it remembered that at a regular term of the supreme court of the State of Oregon, begun and held at the court-room, in the city of Salem, on the first Monday, the 7th day, of March, 1887—present, Hon. William P. Lord, chief justice; Hon. W. W. Thayer, associate justice; Hon. Reuben S. Strahan, associate justice, and J. A. Stratton, clerk—the following proceedings were had on Wednesday, the 16th day of March, 1887, the same being the seventh judicial day of said term:

C. W. SANFORD, Respondent, }
vs. } Appeal from Coos County.
H. W. SANFORD, Appellant. }

This cause having heretofore, to wit, on Thursday, the 10th day of March, 1887, been duly argued by the attorneys for the respective parties above named and having been then by this court reserved for further consideration, now, at this time, this court, having duly considered all the questions presented by the transcript in said cause and the arguments of the respective attorneys thereon and being now fully advised in the premises, finds that there is not error, as alleged, and that the said appellant holds legal title to the real estate described in the complaint herein, to wit, the southeast

quarter of section 9, in township twenty-four south, of range twelve west, of the Willamette meridian, in Coos county, Oregon, in trust for the respondent herein, and that said respondent is entitled to a conveyance from said appellant of said premises in fee simple. It is therefore considered by the court that the said respondent is equitably the owner in fee simple of said premises;
108 that the said appellant be, and he is hereby, forever enjoined and restrained from prosecuting any proceeding at law for the recovery of the possession of said premises, and particularly the action of ejectment mentioned in the complaint herein; that within thirty days from the entry of this decree in the court below the said appellant make, execute, and deliver to the said respondent, duly witnessed and acknowledged, so as to entitle it to record, a good and sufficient deed of conveyance of the real estate aforesaid, and of all his right, title, and interest therein, with a covenant of warranty against all persons claiming or to claim the said property or any part thereof by, through, or under the said appellant, and that upon the failure or neglect of said appellant to execute such instrument, then this decree stand and enure as such conveyance, and in lieu thereof that the said respondent have and recover of the said appellant, and also from S. R. Crawford and R. Main, his sureties on this appeal, the costs and disbursements of this appeal, allowed and taxed at $44.00, and also the costs and disbursements of this cause in the court below, taxed or to be taxed, less the sum of fifty dollars, the amount paid by said appellant to said respondent as the purchase price of said land; that this cause be remanded to the court below, and that a decree be there entered and docketed in accordance herewith.

109 In the Supreme Court of the United States.

H. W. SANFORD, Plaintiff in Error,
vs.
C. W. SANFORD, Def't in Error.

Writ of error to the supreme court of the State of Oregon.

H. W. Sanford, plaintiff in error above named, assigns the following errors in the proceedings and record of the supreme court of the State of Oregon, returned in obedience to the writ of error in the above-entitled proceeding, and to which this assignment of errors is attached, upon which he relies to reverse the judgment and decree of the said supreme court of the State of Oregon described in said writ of error:

First. The supreme court of the State of Oregon erred in that it adjudged and decreed that the matters alleged in the complaint in the suit of C. W. Sanford *vs.* H. W. Sanford were or are sufficient to authorize or support said decree.

Second. Said supreme court of the State of Oregon erred in its said decree, in that it therein sets aside and annuls the patent issued by the United States in favor of plaintiff in error, conveying to him the lands described in said decree.

Third. Said supreme court of the State of Oregon erred in its said decree, in that it thereby overruled and denied the validity of the decision of the Secretary of the Interior made in the con-
110 test between C. W. Sanford and H. W. Sanford, set forth in said complaint; which decision was in favor of this plaintiff and against said defendant.

Fourth. Said supreme court of the State of Oregon erred in its said decree, in that the facts alleged in the complaint and found by said court do not show any fraud of plaintiff in error or imposition upon the officers of the Land Department or land officers of the Government of the United States, or any fraud, misconduct, or mistake of said officers such as could authorize or permit said court to set aside, reverse, modify, or overrule their action in awarding the land described in said decree to this plaintiff and issuing to him the patent therefor.

Fifth. Said supreme court of the State of Oregon erred in its said decree, in that the facts alleged in the pleadings and the facts found by the said court in said suit were not sufficient to authorize or sustain said decree.

Sixth. Said supreme court of the State of Oregon erred in its said decree, in that it by said decree, without authority of law and without any fact, either alleged or proven, to sustain the same, deprives plaintiff in error of his rights to the land described in the complaint, granted to him by the patent of the United States described in the complaint.

Seventh. The supreme court of the State of Oregon erred in its said decree, in that no facts are alleged in the pleadings or found by the court upon which it had any jurisdiction or authority to make its said decree that plaintiff in error took or held the patent of the United States described in the complaint or the legal
111 title to the lands therein granted to him in trust for the defendant in error; all of which several errors fully appear in the return of the said supreme court of the State of Oregon to said writ of error and, as plaintiff in error alleges, are sufficient to reverse said decree of the supreme court of the State of Oregon.

JAMES F. WATSON, E. B. WATSON, WILSON,
T. HUME, & A. M. CRAWFORD,
JOHN H. MITCHELL,
Counsel for Pl'tf in Error.

With the following indorsements: Filed Sep. 30th, 1887. W. H. Holmes, clerk of the supreme court of the State of Oregon.

112 U. J. B. DEPARTMENT OF THE INTERIOR, D. K. M. K.
WASHINGTON, *August* 30, 1883.

The Commissioner of the General Land Office.

SIR: I have considered the case of H. W. Sanford *vs.* C. W. Sanford, involving the N. E. ¼ of the S. E. ¼ of section 9, township 24 S., range 12 W., Roseburg, Oregon, on appeal by the plaintiff from your decision of July 8th, 1882, awarding the land to the defendant. It appears that the township plat embracing said section was filed

July 31, 1879; that on September 8, 1879, C. W. Sanford filed declaratory statement No. 3600, covering said tract, alleging settlement September 1, 1870; that on September 27, 1879, H. W. Sanford filed declaratory statement No. 3615, not covering said tract, alleging settlement May 20, 1871, and that on subsequent application your office permitted an amendment of the latter's filing so as to include said tract. There are two preliminary questions to be settled before considering the case on its merits: Firstly, plaintiff objects to the admission as evidence of a transcript from the records of the Coos county circuit court of Oregon, in a suit between the same parties,
113 for the reason that he is entitled to have all and not part of the testimony read. As the transcript contains only the findings of the court and the written testimony of the said plaintiff, as it concerned the land in contest, and as plaintiff was present when it was offered and at liberty to explain any part of it or to have the entire testimony produced if he desired it, it is held that said transcript is admissible as evidence; secondly, defendant objects to the admission as evidence of certain depositions taken before Alex. Stauff, commissioner, for the reason that he did not receive notice from said Stauff of the time at which said deposition would be taken, as required by the commissioner. It appears that the proceedings were regular; that defendant's counsel duly received a copy of the names of the witnesses and of the interrogatories; that he failed to file cross-interrogatories within the period provided, and that he has not objected to the competency of the witnesses. The rules of practice contemplate the filing of cross-interrogatories, and that the testimony shall be taken only on the interrogatories transmitted to the commissioner. Wherefore defendant received the notice to which the rules entitled him, has lost no rights except those he waived, and it is held that the said depositions are admissible as evidence. The records fail to show a ruling on the above objections by your office or by the local land office, or whether the evidence referred to was considered by either office.
114 Upon careful examination of the evidence I find that in 1871 H. W. Sanford settled upon one hundred and sixty acres of land with the view to pre-empting it when surveyed, and that he made valuable improvements on it, including the tract in contest; that he afterwards invited C. W. Sanford to join him, and assigned him a certain tract whereon to build a cabin, with the understanding that if said tract fell within his claim, starting the line of survey from the lands of the adjoining settler on the south, it should be the property of the plaintiff, and the defendant should remove to the next forty acres; that plaintiff aided defendant to build a cabin and otherwise improve said tract about January, 1872, and afterwards, during the same year, had the survey made which, starting as agreed, included the tract in contest; that defendant never made or maintained a permanent residence on the land for three years, and during the following two years resided and kept a hotel in the town of Marshfield, whilst plaintiff occupied and cultivated it; that in the fall of 1875 defendant sent lumber and workmen to build a house on said tract, and was ordered away by plaintiff and forbid-

den to build on it, on the ground that it was plaintiff's land; but that he built there notwithstanding said notice and has resided there since, and that the plaintiff has never ceased to regard and
115 to treat said tract as his pre-emption claim, whilst the defendant occupied it prior to 1875, subject to the contract above referred to, and since 1875 has never occupied it as a claim with the plaintiff's consent. On these findings it is evident that C. W. Sanford acquired no right by his original license to occupy or by his subsequent forcible intrusion and settlement upon H. W. Sanford's claim, and therefore his filings should be canceled and the land awarded to the latter. Your decision is accordingly reversed. Herewith are returned the papers accompanying your letter of November 17, 1882.

Very respectfully,

M. L. JOSLYN,
Acting Secretary.
A. M. CRAWFORD,
Attorney for Def't, H. W. Sanford.

Vol. 3, 843.
Dated Oct. 28, 1886.

The foregoing bill of exceptions is this day signed, allowed, and ordered filed as part of the record in this suit.
Dated Jan'y 31st, 1887.

R. S. BEAN, *Judge.*

116 W. H. W.
H. O. B.
G. DEPARTMENT OF THE INTERIOR, W. O. C.
GENERAL LAND OFFICE, *Feb.* 18, 1886. J. G.

I, Wm. A. J. Sparks, Commissioner of the General Land Office, do hereby certify that the annexed papers—papers one to one hundred and twenty-three, inclusive—are a true and literal exemplification of the testimony and other papers in the case of Sanford *vs.* Sanford, Roseburg (Oregon) land office, now on file in this office.

In *the* testimony whereof I have hereunto subscribed
[SEAL.] my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

WM. A. J. SPARKS,
Commissioner General Land Office.

117 C. W. SANFORD, Respondent,
vs.
H. W. SANFORD, Appellant. } Filed March 16, 1887.

A. M. Crawford and J. F. Wilson for appellant.
S. H. Hazard for respondent.

Opinion by LORD, *C. J.:*

This is a suit begun by cross-bill to enjoin an action of ejectment brought by defendant, and to have him declared a trustee of the

legal title to certain lands described therein. The defendant is the holder of a patent of the United States to said lands under the pre-emption laws, and the object of the present suit is to charge him as trustee of said property and to compel a conveyance to the plaintiff. It may be admitted that the facts are not stated in the complaint with much conciseness or precision, but we think they are sufficient as alleged, if proved, to entitle the plaintiff to the relief for which he prays. There can be no doubt but that it is the duty of the officers of the Land Department to determine upon the facts to whom patents shall be issued for the public lands. The law has entrusted them with the performance of this duty, and when done all reasonable presumptions must be indulged in support of their action. As to all matters of fact within the scope of their authority their findings must be taken as conclusive, in the absence of fraud and imposition.

This doctrine has often been expressly affirmed by the highest judicial tribunal of the country. Johnson *vs.* Towsley, 13 Wall., 72; Moore *vs.* Robinson, 96 U. S., 530; Smelting Company *vs.* Kent, 104 U. S., 636. Hence a patent can-
118 not be collaterally attacked, but only by a direct proceeding in equity, based on mistake of the law in its issuance or fraud and imposition in its procurement. "If the officers of the law," said Mr. Justice Field, "mistake the law applicable to the facts or misconstrue the statutes and issue a patent to one not entitled to it, the party wronged can resort to a court of equity to correct the mistake and compel the transfer of the legal title to him as the true owner. The court in such case merely directs that to be done which these officers would have done if no error of law had been committed. The court does not interfere with the title of a patentee when the alleged mistake relates to a matter of fact concerning which these officers may have drawn wrong conclusions. A judicial inquiry as to the correctness of such conclusion would encroach upon a jurisdiction which Congress has devolved exclusively upon the Department. It is only when fraud and imposition have prevented the unsuccessful party in a contest from fully presenting his case or the officers from fully construing it that a court will look into the evidence. It is not enough, however, that fraud and imposition have been practiced upon the Department, or that false testimony or fraudulent documents have been presented; it must appear that they affected his determination, which otherwise would have been in favor of the plaintiff. He must in all cases show that but for the error or fraud or imposition of which he complains he would
119 have been entitled to the patent. It is not enough to show that it should have been issued to the patentee. It is for the party whose rights are alleged to have been disregarded that relief is sought, not for the Government, which can file its own bill when it desires the cancellation of a patent unadvisedly or wrongfully issued. Bohall *vs.* Della, 114 U. S., 47; Sparks *vs.* Pierce, 115 U. S., 408.

The application of these principles to the facts in hand *are* decisive of this case. At the outset it may be said that it is clear from

the evidence that the defendant has not at any time resided upon or cultivated or improved the land in dispute or any part thereof; but this of itself is not enough to serve the purposes of the plaintiff. It only shows that the defendant is not entitled to a patent. The law requires the plaintiff to go further and show such a compliance with the law but for the fraud or imposition of the *plaintiff* he would be entitled to and awarded the patent for the lands. In 1871 the defendant, who is the brother of the plaintiff, had settled upon a certain parcel of unsurveyed public lands as a pre-emption claim. Adjoining his claim there were other such public lands. With a view to secure it for his brother, who then resided in California, he put in possession of it a friend to temporarily hold it until he could notify his brother and ascertain whether he desired to make a settlement upon it as a pre-emption claim. Under this state of facts he wrote to the plaintiff and requested him to come to Oregon and settle upon the adjoining claim. In response to that invitation the plaintiff came for the purpose of settlement upon the land, and the defendant pointed it out to
120 him and helped him to build his cabin upon it in furtherance of his settlement. They thus resided upon adjoining claims for several years, the defendant all the while recognizing the settlement of the plaintiff, who, in the meantime, had made improvements, all of which were located on the forty acres now in dispute. In 1879 the lands settled upon by these parties were surveyed and the plat thereof filed in the land office at Roseburg, when it became known that the tract of land in dispute belonged to that portion of the land settled upon by the plaintiff under the circumstances indicated. On September 9 and 27, respectively, of that year the plaintiff and defendant filed their declaratory statements to the parcels of land upon which they had settled. More than a year afterwards the defendant amended his declaratory statements so as to include the tract in dispute and upon which the plaintiff had resided for quite a number of years and had built his house and barn and outhouses, set out an orchard, and made other improvements. The evidence shows and the court below finds that this was procured upon the *ex parte* affidavits of the defendant and two witnesses and without any notice to the plaintiff of the proceeding. It is beyond dispute, at this time and when these affidavits were made, that the plaintiff was then and had been during the time before mentioned residing upon and improving the identical land included in this amended statement. By this means the defendant was enabled to procure the patent in fraud of the rights of the plaintiff, and it is clear from the evidence but for such fraud and imposition he would not only
121 have been entitled to but have been awarded the patent. We have not undertaken to refer to all the facts in detail. We are satisfied that the decree must be affirmed.

122 STATE OF OREGON, } ss:
County of Marion, }

I, W. H. Holmes, clerk of the supreme court of the State of Ore-

gon, do hereby certify that the foregoing transcript has been by me carefully compared with the original record, as follows:

First. The petition for writ of error in the case entitled H. W. Sanford *vs.* C. W. Sanford, and that pages 2 to 12 hereof contain a true and correct transcript and the whole thereof of such original petition.

Second. With the original order allowing said writ in said cause, and that page 13 hereof contains a true and correct transcript and the whole thereof of such original order.

Third. With the original bond on appeal in said cause, and that pages 14 to 16, inclusive, hereof contain a true and correct transcript and the whole thereof of such original bond.

Fourth. With the original citation in said cause, and that pages 17 and 18 hereof contain a true and correct transcript and the whole thereof of such original citation.

Fifth. With the original transcript of the cross-bill filed in this court from the county of Coos, in said State, and that pages 19 to 45, inclusive, hereof contain a true and correct transcript and the whole thereof of such original transcript of cross-bill in the cause therein, entitled C. W. Sanford *vs.* H. W. Sanford.

Sixth. With the original transcript of the demurrer to said cross-bill in said cause, and that pages 46 to 51, inclusive, hereof contain a true and correct transcript and the whole thereof of such transcript of demurrer.

123 Seventh. With the transcript of the motion to strike out said cross-bill, and that pages 52 and 53 hereof contain a true and correct transcript of the same and of the whole thereof.

Eighth. With the transcript of the order and judgment of the circuit court of Coos county on said motion and demurrer, and that pages 54 and 55 hereof contain a true and correct transcript and the whole thereof of said order and judgment.

Ninth. With the transcript of the answer to said cross-bill, and that pages 55 to 71, inclusive, hereof contain a true and correct transcript of the same and the whole thereof.

Tenth. With the transcript of the order of said circuit court continuing said cause, and that pages 72 to 74, inclusive, hereof contain a true and correct transcript of the same and the whole thereof.

Eleventh. With the transcript of said circuit court taking said cause under advisement, and that page 74 hereof contains a true and correct transcript of the same and the whole thereof.

Twelfth. With the transcript of findings of fact and conclusions of law by said circuit court in said cause, and that pages 76 to 82, inclusive, hereof contain a true and correct transcript of the same and the whole thereof.

124 Thirteenth. With the transcript of motion for additional findings of fact and conclusions of law in said cause, and that pages 82 to 85, inclusive, hereof contain a true and correct transcript of the same and the whole thereof.

Fourteenth. With the additional findings of fact and conclusions of law by the said circuit court in said cause, and that pages 86 to

89, inclusive, hereof contain a true and correct transcript of the same and the whole thereof.

Fifteenth. With the transcript of the decree of said circuit court in said cause, and that pages 90 to 92 hereof contain a true and correct transcript of the same and the whole thereof.

Sixteenth. With the transcript of stipulation extending time to file bill of exceptions in said cause, and that page 92 hereof contains a true and correct transcript of the same and the whole thereof.

Seventeenth. With the transcript of the order of said circuit court so extending the time to file bill of exceptions, and that page 93 hereof contains a true and correct transcript of the same and the whole thereof.

Eighteenth. With the transcript of the notice of appeal in said cause, and that pages 94 to 105, inclusive, hereof contain a true and correct transcript of the same and the whole thereof.

Nineteenth. With the certificate of the clerk of said Coos county to the transcript in said cause, and that page 106 hereof contains a true and correct transcript of the same and the whole thereof.

125 Twentieth. With the decree of the supreme court of the State of Oregon in said cause, and that pages 107 and 108 hereof contain a true and correct transcript of said decree and the whole thereof.

Twenty-first. With the assignment of errors in the cause entitled H. W. Sanford, pl'ff in error, *vs.* C. W. Sanford, def't in error, and that pages 109 to 111, inclusive, hereof contain a true and correct transcript of the same and the whole thereof.

Twenty-second. With the transcript of the record in said cause of C. W. Sanford *vs.* H. W. Sanford, appealed to the supreme court of the State of Oregon from Coos county; of the opinion and findings of the Hon. Secretary of the Interior, offered and received as evidence in the trial of said cause and constituting a part of the bill of exceptions in said cause, and that pages 112 to 116, inclusive, hereof contain a true and correct transcript of the same and the whole thereof.

Twenty-third. With the opinion of the supreme court of the State of Oregon in the case of C. W. Sanford *vs.* H. W. Sanford, and that pages 117 to 121 hereof contain a true and correct transcript and the whole thereof of said opinion as the same and the whole thereof severally appear of record and in my official custody and keeping.

Witness my hand and the seal of the said supreme court, affixed at my office, in the city of Salem, Oregon, this October the 6th, A. D. 1887.

[Seal Supreme Court, State of Oregon.]

W. H. HOLMES,
Clerk of said Supreme Court.

Endorsed on cover: Oregon supreme court. No. 578. H. W. Sanford, plaintiff in error, *vs.* C. W. Sanford. Filed October 22, 1887.

Supreme Court U. S.
FILED,
MAR 13 1891
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

H. W. SANFORD, Plaintiff in Error,
vs.
C. W. SANFORD, Defendant in Error.
No. 275.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

M. D. BRAINARD,
Attorney for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1890.

H. W. SANFORD, Plaintiff in Error,
vs.
C. W. SANFORD, Defendant in Error. } No. 275.

Brief and Argument for Plaintiff in Error.

Error to the Supreme Court of the State of Oregon:

This is an attempt to retry in Equity the same questions of fact which were originally tried and decided against the defendant in error by the Secretary of the Interior, in the contest before the Land Department.

The cross-bill in Equity filed by defendant in error in the Circuit Court of Coos County, Oregon, (Record, pp. 8-18,) recites at great length the various acts of settlement performed by him on the tract of land in dispute, which acts, he claims, invested him with a prior equity in the land; but these facts all existed prior to the year 1883, when the contest between these same parties was tried before the Land Department, and they formed the subject matter of that trial, as is abundantly shown by the decision of the Secretary of the Interior. (Record, p. 47-48.) The defendant then had his day in Court before the tribunal specially constituted by law for the trial of these questions, and he had a full and fair opportunity to present his testimony upon all the facts in the case, and he did

present such testimony, and was cast in the action. The Secretary had before him the same disputed questions of fact, and, upon consideration of the whole testimony, he decided the case in favor of the plaintiff in error—H. W. Sanford—and one ground of his decision was, that as a matter of fact the defendant in error, C. W. Sanford, had not maintained a residence on the land for three years between 1872 and 1875, and as a result of such abandonment had thereby lost all right to enter it under the pre-emption law as against H. W. Sanford. (Record, p. 48.)

The findings of fact by the Circuit Court (Record, pp. 31-35) are simply findings of fact on precisely the same questions which were tried and determined before the Land Department. The findings of fact by the Secretary of the Interior in the contest before the Land Department were final and conclusive, and the same questions were not open to retrial by the Circuit Court of Coos County.

Vance *vs.* Burbank, 101 U. S., 519;
Johnson *vs.* Towsley, 13 Wallace, 72;
Warren *vs.* Van Brunt, 19 *ibid*, 646;
Shipley *vs.* Cowen, 91 U. S., 330;
Moore *vs.* Robbins, 96 U. S., 530;
Marquez *vs.* Frisbie, 101 U. S., 473;
Vance *vs.* Burbank, *ibid*, 519;
Bohall *vs.* Dilla, 114 U. S., 47;
Sparks *vs.* Pierce, 115 U. S., 408.

The Supreme Court of Oregon, by its decision in the case, (Record, pp. 50-51,) admitted that the decision of the Secretary of the Interior was final in the absence of fraud, but held that, by reason of certain false affidavits filed by the plaintiff in error in order to secure an amendment to his pre-emption filing upon the tract in dispute, the Land Department was deceived and misled into granting him a patent.

The precise words of the Court are these:

"By this means (the alleged false affidavits) the defendant was enabled to procure the patent in fraud of the rights of the

plaintiff, and it is clear from the evidence but for such *fraud and imposition* he (defendant in error) would not only have been entitled to but have been awarded the patent."

Record, p. 51.

This finding was clearly erroneous, *and is affirmatively disproved by the record in this case*, as will be shown to a demonstration.

The cross-bill filed by C. W. Sanford simply sets up certain facts which are designed and intended to establish *his superior equity* in the tract of land which had been patented to H. W. Sanford.

In paragraph 22 of this bill he alleged that H. W. Sanford was allowed to amend his pre-emption filing so as to embrace the tract in dispute, by the Commissioner of the General Land Office, *but he does not allege that that amendment was allowed by or through the use of false affidavits, or charge any fraud whatever in the procurement of said amendment.*

Record, p. 15.

In paragraph 24 of the cross-bill he alleged:

"That the said Secretary of the Interior based his said decision upon the ground that the defendant (plaintiff in error) was *the oldest settler upon the public lands*, and that he ought to have the right to include a full claim of 160 acres of land."

Record, p. 17.

The original findings of fact and conclusions of law were filed in the Circuit Court on September 20, 1886, and are based upon the theory of *prior equities* in C. W. Sanford. (Record, pp. 31-34.) On September 22, 1886, two days after these findings were filed, the defendant in error requested the additional finding that H. W. Sanford procured his amended filing by

false affidavits which were an imposition and fraud on the Commissioner of the General Land Office.

Record, p. 34.

The trial court made the additional finding as requested, (Record, p. 36,) and in this manner the question of fraud was put into the record.

The cross-bill as filed did not charge any fraud in this amended filing, *and the bill was never amended so as to make any such allegation*, and the fraud question seems to have been an afterthought.

There is a variance between the allegations of the bill and the decree of the Court, and the allegations of the bill are not broad enough to sustain the decree, for it is settled law that the decree must conform to the pleadings, as well as to the proofs in the cause.

Crocket *vs.* Lee, 7 Wheat., 522;
Carneal *vs.* Banks, 10 *ibid*, 181;
Harding *vs.* Handy, 11 *ibid*, 103;
Piatt *vs.* Vattier, 9 Peters, 406;
Boone *vs.* Chiles, 10 *ibid*, 177;
Hobson *vs.* McArthur, 16 *ibid*, 182.

The Supreme Court of Oregon seems to have misunderstood the nature of a pre-emption declaratory statement in holding that the mere filing of such declaratory statement enabled H. W. Sanford *to procure a patent* for the land in suit.

Section 2259 Revised Statutes provides that every person possessing proper qualifications who makes settlement in person on the public lands subject to pre-emption, and who inhabits and improves the same, and erects a dwelling-house thereon, is authorized to enter one hundred and sixty acres at the proper district land office on payment of the government price. The right of pre-emption thus granted is based upon settlement, personal residence, improvement, and the erection of a dwelling-house. (9 Land Decisions, Interior Department, p. 49.) And

no vested right is acquired until proof of compliance with this section of the statute is made and the purchase money is paid.

Frisbie *vs.* Whitney, 9 Wall., 187;
Hutchins *vs.* Low, 15 *ibid*, 77.

Section 2265 Revised Statutes provides for the filing of declaratory statements by pre-emptors, but this is a mere *notice of a claim*, and not the claim itself, and confers no *vested right*, for the pre-emption right depends upon the performance by the settler of the acts prescribed by Section 2259 Revised Statutes, verified by final proof thereof to the satisfaction of the Land Department, and payment of the purchase money.

State *vs.* Dorr, 2 Land Decisions, Int. Dept., p. 635;
Hutchins *vs.* Low, *supra.*

As a matter of *law*, it was impossible for the mere declaratory statement of H. W. Sanford to have secured him the patent for the land as decided by the Supreme Court of Oregon. (Record, p. 51.) As a matter of fact, the merits of the claims of both parties were fully inquired into in the trial before the Land Department, and the Secretary of the Interior awarded the land to H. W. Sanford because he had the best right to it on the merits, and his decision was not influenced in any manner by the mere pre-emption filing of H. W. Sanford.

Record, p. 48.

The Supreme Court of Oregon erred both in its finding of fact and in its conclusion of law in holding that the patent would have been issued to C. W. Sanford but for the pre-emption *filing* of H. W. Sanford in fraud of his rights. The decision of the Secretary of the Interior shows affirmatively that he lost the land because H. W. Sanford had a better pre-emption right to it.

Aside from this, the decision of the Secretary of the Interior was made after a fair trial, at which defendant in error had a

full opportunity to present this and all other questions, and the Circuit and Supreme Courts of Oregon had no jurisdiction to inquire into the question of fraud in the filing of the pre-emption declaratory statement of H. W. Sanford, because, as said by this Court, in Vance *vs.* Burbank :

"It has also been settled that the fraud in respect to which relief will be granted in this class of cases must be such as has been practiced on the unsuccessful party, and prevented him from exhibiting his case fully to the Department, so that it may properly be said that there never has been a decision in a real contest about the subject-matter of inquiry. False testimony or forged documents even are not enough if the disputed matter has been presented to or considered by the appropriate tribunal. (United States *vs.* Throckmorton, 98 U. S., 61; Marquez *vs.* Frisbie, 101 U. S., 473.) The decision of the proper officers of the Department is in the nature of a judicial determination of the matter in dispute."

101 U. S., 519.

Respectfully submitted,

M. D. BRAINARD,

Attorney for Plaintiff in Error.

Office Supreme Court U. S.
FILED
MAR 1891
JAMES H. MCKENNEY
Clerk

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 275.

H. W. SANFORD, *Plaintiff in Error,*

vs.

C. W. SANFORD, *Defendant in Error.*

In Error to the Supreme Court of the State of Oregon.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

J. N. DOLPH,
Attorney for Defendant in Error.

W. H. MOORE & CO., PRINTS., 511 Eleventh St. N. W.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 275.

H. W. SANFORD, *Plaintiff in Error,*

vs.

C. W. SANFORD, *Defendant in Error.*

In error to the Supreme Court of the State of Oregon.

Brief and Argument for Defendant in Error.

STATEMENT.

This cause was brought into this court by writ of error to the Supreme Court of the State of Oregon.

The suit was begun by the filing of a cross bill to enjoin proceedings at law in an action for the recovery of the possession of a tract of land described as the N. E. ¼ of the S. E. ¼ of Sec. 9, T. 24, S. R. 12 W., containing 40 acres, situated in Coos county, in the state of Oregon, and to have the plaintiff in error declared to be a trustee of the legal title to said tract of land for the defendant in error.

The parties to the suit were contestants for the land in the Land Office, each claiming it as a portion of his preemption claim. It was awarded to the defendant in error

by the register and receiver of the local Land Office, and upon appeal, by the Commissioner of the general Land Office, but upon appeal to the Secretary of the Interior the decision of the Commissioner was reversed and the land awarded to the plaintiff in error, who, having entered the land, commenced an action of ejectment against the defendant in error who was in possession; whereupon the defendant in error, in accordance with the provisions of the Oregon code, commenced a suit by filing a cross bill to restrain the proceedings at law and to have the plaintiff in the action at law decreed to be a trustee of the legal title to the land for him.

The cause being at issue was tried by the Circuit Court of Oregon upon oral testimony, and findings of fact and of law filed, and the defendant in the suit, the plaintiff in error in this court decreed, to be a trustee of the legal title to the land in controversy for plaintiff in the suit, and to convey the same to him and to pay the costs of the suit. The case was appealed to the Supreme Court of the State where the decree of the Circuit Court was affirmed.

THE COMPLAINT.

The plaintiff, in the court below in his cross bill alleged in substance, that on Sept. 1, 1871, he was qualified to enter a pre-emption claim under the laws of the United States, and on that day made settlement in person on the northeast quarter of the southeast quarter of section nine, in township twenty-four, south of range twelve, west of the Willamette meridian in Coos county, Oregon, and land adjacent thereto, not exceeding one hundred and sixty acres, the same being public land subject to pre-emption, with the intention of entering the same as soon as surveyed. (See Record, folio 20, p. 8.) That such settlement was made at the request of the defendant, who had settled upon

certain unsurveyed land of the United States adjoining said tract, with the intention of purchasing the same when surveyed under the pre-emption laws. That the survey of the land was approved in 1879, and filed in the local land office, July 31, 1879. (See Record, folio 21, p. 8.)

(Here follows lengthy and somewhat diffuse allegations detailing the improvement of the land in controversy by the plaintiff, made with the knowledge and consent of the defendant, the improvements consisting of a house and outbuildings, clearing and fencing the land, planting an orchard, &c., and setting forth certain litigation between the parties in which the right to the land was in question, and quoting from the testimony of the plaintiff in error, taken in such litigation. [See Record, folios 22 to 36 inclusive.] These allegations taken together make a strong case of equitable estoppel against the plaintiff in error, and were found by the court below to be true substantially as alleged. The allegations concerning the litigation between the parties, the testimony of the plaintiff in error therein, and the allegations of the complaint which followed, are substantially admitted by the answer.)

Plaintiff further alleges in his cross bill that shortly after the survey of said lands and on the 8th day of September, 1879, the plaintiff duly filed in the United States District Land Office, at Roseburg, in the State of Oregon, his declaratory statement, covering the E. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$, and the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of the said sec. 9, in T. 24, S. R. 12, W. of Willamette meridian, alleging settlement September 1, 1871, and that, thereafter, to wit: on the 27th day of September, 1879, the said defendant filed in the said District Land Office his declaratory statement, covering the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, the W. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$, and the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of said sec. 9, which said declaratory statement of the said defendant was afterwards, by permis-

sion of the Commissioner of the General Land Office, amended so as to cover the lands in controversy. (See Record, folio 37.)

That thereafter, the defendant instituted a contest with the plaintiff, in the District Land Office, to decide their respective rights to purchase the said N. E. ¼ of the S. E. ¼ of the said sec. 9; that an order was made by the register allowing the defendant to take the testimony of his witnesses before the county clerk of Coos county, Oregon, and notice of the time and place where the depositions of defendant's witnesses were to be taken, together with the interrogatories to be propounded to them, were duly served on the plaintiff, that plaintiff retained an attorney to attend to the matter, and delivered the said papers, so served upon him as aforesaid, to said attorney, who agreed to attend to the same: but said attorney failed and neglected to prepare or serve any interrogatories or cross-interrogatories and, on the day set for the taking of the depositions of defendant's witnesses, the plaintiff and his attorney appeared before said clerk for the purpose of cross-examining the said defendant and his witnesses, but were denied the privilege of doing so, for the reason that plaintiff had not served or filed cross-interrogatories, as required by the rules of the Department; said clerk also refused to take the depositions of the plaintiff or his witnesses, for the reason that the interrogatories to be propounded to them had not been served upon said defendant. That neither plaintiff or his attorney had knowledge of the rules of practice of the Department, which required the service of interrogatories and cross-interrogatories, but supposed the cross-examination of defendant's witnesses and the examination of plaintiff's witnesses, in the taking of said depositions, would be upon oral interrogatories, as had been the practice until shortly before that time; that the plaintiff was a

poor man, and lived on said land about 80 miles from the land office, and was unable to obtain the attendance at said land office, at the time set for the hearing of said contest, of persons who were material witnesses for him in said contest, although he made every effort in his power so to do; that the said plaintiff was not able to induce any person to attend the hearing of said contest at said land office with him, that no subpœnas issued out of said land office for witnesses, that he succeeded in obtaining the attendance of two persons, who then lived near said land office, and who formerly lived near said land; that his deposition and the depositions of said persons were taken at the land office and used upon the hearing of said contest, but the said persons were not as fully conversant with the facts regarding the plaintiff's residence upon and cultivation of said land, as witnesses whose attendance he was unable to obtain. That on the hearing of said contest it was decided in his favor, that, thereafter, the defendant appealed from the decision to the Commissioner of the General Land Office, and on such appeal, the Commissioner affirmed said decision. That the defendant appealed from the decision of the Commissioner, to the Secretary of the Interior, and on or about the month of September, 1883, the Acting Secretary of the Interior, reversed the decision of the Commissioner, and awarded the land to the defendant; that the plaintiff was a poor man, and was unable to employ an attorney to represent hin before the Commissioner and the Secretary of the Interior, in said contest. That the said defendant, in his said deposition, taken in the matter of said contest and used in evidence on the hearing thereof, falsely swore that he had occupied and cultivated the said N. E. ¼ of S. E. ¼, prior to the fall of 1875, and that he had always intended to hold the same as a part of his land claim, and had never ceased to regard

and to treat said tract as a part of his pre-emption claim while the said plaintiff occupied it prior to 1875, and that since the said date the said plaintiff herein had never occupied said tract of land with the consent of the said defendant herein, whereas, in truth and in fact, the said defendant never had cultivated or improved the said N. E. ¼ of S. E. ¼, or any part thereof, and never had claimed the same, or any part thereof, or declared his intention to claim, or attempt to claim, the said N. E. ¼ of S. E. ¼, as a part of his land claim until a long time after the determination of the suit in equity, between the plaintiff and defendant herein before referred to. (See Record, folios 38, 39, 40 and 41.)

That the said Secretary of the Interior based his said decision upon the ground that the defendant was the oldest settler upon the public lands, and that he should have the right to include 160 acres of land in his claim, and that the question as to how far the defendant should be estopped from asserting any claim to the said land, by reason of his declarations, acts and doings, as in the complaint stated, was not decided or determined by the Commissioner, or the Acting Secretary of the Interior.

That defendant (the plaintiff in error) made final proof upon the lands in controversy Nov. 30, 1883, made payment therefor and final receipt was issued to him.

That plaintiff has been since Sept. 1, 1871, in the quiet and peaceable possession of the land, and is now and has always been ready to pay defendant the price he paid to the U. S. for the land, upon conveyance of the same to him by defendant. That defendant on the 4th of September, 1885, commenced an action of ejectment against the plaintiff to recover possession of the land in controversy, and that he has duly filed his answer to the complaint in such action in which he has shown that he is entitled to relief in equity and now files his cross bill.

That the defendant ought not to be permitted to allege that he is the owner, or entitled to the possession of said N. E. ¼ of S. E. ¼, as against the plaintiff; but that in equity and good conscience he should be adjudged to be estopped from asserting any claim thereto against the plaintiff, by reason of the decree hereinbefore referred to, and the declarations, acts and conduct of the said defendant, hereinbefore mentioned. (See Record Folios 42 and 43).

THE ANSWER.

The defendant in his answer denies in part the allegations in the complaint as to the plaintiff's qualifications as a pre-emptor, his settlement upon and improvement of the land in controversy at the request of and with the knowledge and consent of the defendant, but does not deny the allegations concerning the litigation between the parties, the testimony of the defendant in such litigation, the time and circumstances of the filing of the declarations of the parties respectively upon the land or the false swearing and fraudulent practices of the defendant in the contest in the Land Office. As to all these matters he pleads the decision of the Acting Secretary of the Interior as an estoppel.

Upon the pleadings, the case made by the plaintiff in the court below for relief from the decision of the Acting Secretary of the Interior, as continued from the 20th to the 28th articles, inclusive of the cross bill, is admitted. (The answer is found on pages 22 to 29 of the record).

FINDINGS OF FACT AND LAW.

On the 20th of September, 1886, the court made and filed the following

Findings of Fact and Conclusions of Law:

(1.)

"That about May 1, 1871, defendant, H. W. Sanford, settled upon unsurveyed government land in Coos county,

Oregon, with the intention of taking 160 acres thereof as a pre-emption claim as soon as the same was surveyed.

(2.)

"That on or about Sept. 1, 1871, at the request and solicitation of defendant, plaintiff, C. W. Sanford,
77 moved from the State of California, where he was then residing, and settled upon the land in dispute in this case, the same being then unsurveyed, with the intention of taking the same as a pre-emption claim as soon as surveyed, and has ever since said date resided upon and cultivated and improved said lands.

(3.)

"That said settlement and cultivation of plaintiff on said land was made by plaintiff with the knowledge and consent and at the request of defendant, said defendant pointing the same out to plaintiff and aiding and assisting him in the improvement of the same.

(4.)

"That at no time has defendant resided upon or cultivated or improved said land or any part thereof.

(5.)

"That at the time of the settlements of plaintiff and defendant, as mentioned in findings Nos. 1 and 2, it was supposed that defendant's claim would include 160 acres of government land; but during the summer of
78 1872 it was ascertained that eighty acres thereof would belong to the State of Oregon, for common-school purposes, as soon as surveyed.

(6.)

"That in 1879 the land settled upon by plaintiff and defendant was duly surveyed by the United States and the approved plat thereof filed in the land office at Roseburg, Oregon, on July 31, 1879; wherein it was ascertained and determined that the N. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of Sec. 9, T. 24 S., of R. 12 W., was a portion of the land settled upon by plaintiff at the request and with the knowledge and consent of defendant, as mentioned, findings Nos. 2 and 3.

(7.)

"That on Sept. 9th, 1879, plaintiff filed in the Roseburg land office his declaratory statement, covering the N. ½ of the S. E. ¼ and the E. ½ of the N. E. ¼ of Sec. 9, T. 24 S., of R. 12 W., and on Sept. 27, 1879, defendant filed his declaratory statement covering the E. ½ of S. W. ¼, the N. W. ¼ of S. E. ¼, and S. W. ¼ of N. E. ¼ of said section 9.

(8.)

"That on Oct 14, 1880, said defendant was granted permission by the Commissioner of the General Land Office to amend his declaratory statement so as to include
79 therein the N. E. ¼ of the S. E. ¼ of Sec. 9, T. 24 S., of R. 12, that being the land in dispute in this case

(9.)

"That between the date of the settlement on the N. E. ¼ of S. E. ¼ of Sec. 9, being the land in dispute, and the winter of 1875—'6, plaintiff, by the knowledge and consent and at the request and with the assistance of defendant, made valuable improvements on said land, in building houses and barns, and clearing and improving the same, of the value of $500, it being then understood by plaintiff and defendant that said land was a part of plaintiff's claim and would be taken by him as a pre-emption as soon as the same was surveyed, and said improvements were made with that object in view, as defendant very well knew.

(10.)

"That about Jan'y, 1876, defendant first claimed any interest in the land in dispute, and at that time objected to plaintiff's completing the construction of a dwelling-house upon said land, saying the land belonged to him; but that is the first and only time defendant ever objected to plaintiff's occupying and improving said land prior to the 2d day of February, 1884, except in the commencement of the contest in the land office in 1882.

80 (11.)

"That prior to the arrival in Oregon of plaintiff, as mentioned in finding No. 2, defendant employed and procured one Walker to hold the land in dispute for plaintiff, so as to prevent other parties from settling upon the same.

(12.)

"That from the time of the settlement on the land in dispute by plaintiff to Jan'y, 1876, defendant made no objection to plaintiff's holding or occupying said land, nor did he claim any right to said land, but repeatedly stated to plaintiff and other parties that the land belonged to plaintiff and was a part of his pre-emption claim.

(13.)

"The decision of the Secretary of the Interior of Aug 30, 1883, awarding the land to defendant, was made and based upon the fact that in the opinion of that officer defendant was first settler upon said land and entitled to the same by reason of prior residence and cultivation.

(14.)

"It is not true, as alleged in the answer, that plain-
81 tiff should move the house built by him in 1872 if the same should fall within defendant's pre-emption claim, or that there was any agreement concerning the moving of said house whatever.

(15.)

"That between Jan'y, 1872, and Jan'y, 1883, plaintiff made valuable and permanent improvements, with the knowledge of defendant, on the land in dispute, of the reasonable value of $1800.

(16.)

"That the rents and profits of said land during the time the same has been occupied by the plaintiff, exclusive of the use of the improvements made thereon by plaintiff, is reasonably worth the sum of $250.00.

(17.)

"That at the time of the settlement upon the land in dispute by plaintiff, as mentioned in finding No. 2, he was a qualified pre-emptor under the laws of the United States.

Conclusions of Law.

"As conclusions of law, I find that plaintiff is entitled to a decree of this court, perpetually enjoining and restraining the proceedings at law in the action of ejectment mentioned in the complaint.

2

"The defendant holds the legal title to the land in dispute in trust for the plaintiff.

3

"That plaintiff is entitled to a decree requiring defendant to convey said land to plaintiff within twenty days from this date and in case he fail to do so that said decree stand in place of such conveyance."

And the 22d day of September, 1886, the following additional findings were filed in said cause:

1st. That the amended filing of the defendant herein mentioned in the 22nd allegation in plaintiff's complaint herein, whereby the said defendant was enabled to change his original entry in such a manner as to include therein the northeast quarter of the southeast quarter of section nine, in township twenty-four south, of range twelve west, the land in controversy in this suit, was allowed on the *ex parte* affidavits of the said defendant and his two witnesses, and without any notice whatever to the said plaintiff; that it was not shown by the said affidavits or either of them that the said plaintiff was in possession of or had any improvements upon the said land in controversy; but, on the contrary, it was alleged in the said affidavit of defendant and of one of his said witnesses that the said defendant's house and other valuable improvements belonging to the said defendant were situated upon the said land; that at the time the said defendant and his said

witnesses made the said affidavits the said plaintiff was residing on the said land in controversy, and had a house and other valuable improvements thereon, worth several hundred dollars, and the said defendant was well aware that such was the case, whereas the said defendant had no improvements of any kind whatsoever on the said land in controversy; that the Commissioner of the General Land Office was thereby imposed upon and induced to allow the defendant to amend his said filing in manner aforesaid.

2nd. That at the time the defendant settled upon unsurveyed land, as mentioned in the first finding of fact herein, he intended to take and hold as part of his pre-emption claim eighty acres of land which in the year 1872 he ascertained would be a part of a sixteenth section, and that notwithstanding the defendant was informed and well knew that he could hold the said eighty acres of land as a part of his pre-emption claim by virtue of the fact that he made settlement thereon prior to survey, that he elected to purchase and did purchase said eighty acres of land from the State of Oregon, and that he never asserted any claim to the land in controversy until long after that time.

Conclusions of Law.

1st. That this court cannot review the action of the land office, however erroneous, if fairly and regularly had, upon the mere question of fact as to which was the prior settler upon or who first cultivated the land in controversy, the said plaintiff or the said defendant.

2nd. That the defendant is entitled to receive from the plaintiff the sum of fifty dollars, being the amount paid by the said defendant to the United States as the purchase price of the land in controversy.

3rd. That the plaintiff is entitled to recover judgment against the defendant for his costs and disbursements in this suit, and that the said sum of fifty dollars, or so much thereof as may be necessary, should be credited upon the said judgment, and if the said judgment does not amount to fifty dollars the balance remaining shall be paid to the clerk of this court for the said defendant.

THE QUESTIONS SUBMITTED FOR THE CONSIDERATION OF THIS COURT BRIEFLY STATED ARE:

First, Whether the Commissioner of the General Land Office had power to allow the amendment of the declaration of the plaintiff in error, so as to include the lands in controversy after they had been filed upon by the defendant in error.

Secondly, Whether, if the Commissioner had power to allow the amendment upon a proper showing, it does not sufficiently appear from the whole case that the showing, if any made, was false and fraudulent, and as the contest in the land office was only made possible by the amendment so procured by fraud whether the decision of the Secretary of the Interior should not be disregarded by a court of equity and the the case tried upon its merits.

Thirdly, Whether the facts in the case do not warrant a court of equity in giving the plaintiff in error appropriate relief notwithstanding the decision of the Secretary of the Interior. I shall present the first two of these questions together.

I.

The amendment of the filing of the plaintiff in error, so as to include the land in controversy, was procured by false *ex parte* affidavits and was made without authority of law. As no contest could have been instituted by him for the

land without an amendment of his filing, and this was procured by fraudulent imposition upon the Commissioner of the General Land Office or was allowed by the Commissioner by mistake of law, the subsequent proceedings could confer no jurisdiction upon the officers of the land office and no right upon the plaintiff in error.

Section 2261 of the Revised Statutes is as follows:

"Sec. 2261. No person shall be entitled to more than one pre-emptive right by virtue of the provisions of Section twenty-two hundred and fifty-nine; *nor where a party has filed his declaration of intention to claim the benefits of such provisions for one tract of land, shall he file at any future time, a second declaration for another tract.*"

The power of the Commissioner to allow an amendment of a declaration of intention to claim the benefits of Section twenty-two hundred and fifty-nine after it is filed is denied, certainly, if the power exists, it is confined to cases where by reason of mistake in the description, the land filed on is not the land which was intended to be filed on, and does not extend to a case like the one under consideration, where there was a deliberate change of intention, followed by an amended filing. The rule of the department is that amendments or changes of entries or filings once made, are allowed with great caution, and, as a rule, only where by excusable mistake the applicant failed to get the land he intended to take or which he supposed he was getting.

The right of amendment does not exist where the filing was made for the land intended to be covered thereby.

Upham *vs.* Northern Pac. R. R. Co.
Acting Secretary Muldron to Commissioner Stockslager, Sept. 8, 1888.
Land Decisions VII, p. 298.

Under the law a pre-emptor is entitled to file but one

declaratory statement for land open to settlement and entry.

See Allen *vs.* Baird.
Secretary Lamar to Commissioner Sparks, Nov. 2, 1887.
Land Decisions, Vol. VI, p. 298.

To allow a filing to be changed except in case of a mistake in the description of the land, and to carry out the original intention would be to allow a second filing.

Plaintiff in error in this case deliberately abandoned whatever claim he previously had to the land in controversy, when after the survey of the land, he, on the 8th day of September, 1879, filed his declaratory statement covering the E. ½ of the N. E. ¼ and the N. ½ of the S. E. ¼ of Sec. 9, T. 24, S. R. 12 W., a tract of land which did not embrace the land in controversy, alleging settlement Sept. 1, 1871.

Nineteen days later defendant in error filed on a tract of land embracing the land in dispute.

More than a year afterwards the plaintiff in error amended his filing so as to cover the land in dispute and to enable him to initiate a contest for it with his brother.

The Commissioner of the General Land Office had no power to permit an amendment of the filing in such a case, and the proceeding was void.

If leave to amend his filing was obtained by showing a *prima facie* right to the land in controversy *and that it had been omitted in his previous declaration by mistake* it must have been false. Without such a showing, it must be admitted, that the Commissioner would have had no power to allow the amendment, and that it was, therefore, illegal and void and could not form the basis of a contest.

That such a showing, if made, was false and fraudulent is conclusively shown by the evidence in the case. In fact,

the allegations of the complaint not denied in the answer show that there could have been no mistake in the original filing of the plaintiff in error, and that when it was made he had concluded not to contest for the land, but changed his mind a year afterwards and after his brother had filed upon tt.

I quote the following from the testimony of the plaintiff in error set forth in the cross bill taken in a suit pending in the State Court of Oregon, in which the land in dispute was incidentally involved.

Q. What amount of land is now embraced in C. W. Sanford's claim?

A. I can't state; I suppose he claims 160 acres.

Q. What amount of land do you hold and constitute your claim?

A. I hold, I am only in possession of 80 acres of unsurveyed land and 80 acres of entered land, owing to C. W. Sanford's settling so close to my residence.

Q. What is the other land you spoke of besides the unsurveyed land?

A. The same quality of land adjoining.

Q. State whether your claim, then, is now limited to 160 acres, including the 80 acres of school land?

A. It is, for the reason that he has settled that close to my residence.

Q. The $500 improvements you have mentioned as being on the land claim of C. W. Sanford, is that the land claim upon which he now resides?

A. It is.

Q. Do you assert any claim to the land upon which C. W. Sanford resides now?

A. The land is not in a situation for litigation; I have not decided positively, when it becomes so, to contend for it.

Q. If you should decide to contend for it, and should obtain it, would you then take all the improvements that you say are worth $500?

A. I can't say that I shall contend for it at the present day; as I said before, it will be owing how much I am damaged in this lawing.

Q. Then you expect to charge him with $500, as the valuation of the improvement upon his claim, and then, if you consider yourself damaged in this suit, to try and hold the land and improvements upon which his claim is situated?

A. I can't say anything about it at this date; I claim 160 acres of land there as a resident there six or eight months before he saw the creek or put foot on the creek.

Q. If you take 160 acres of land, as you claim, will that include the land where his improvements now are?

A. Including the 80 acres of entered land it would not cover it, to the best of my knowledge.

Q. Do you include the 80 acres of entered as part of your claim?

A. I do, as the beginning of the west end of my location; C. W. Sanford has settled at the east end of my present possessions.

Q. When you say in your direct examination that the improvements upon your land claim are worth $800, and that the improvements upon C. W. Sanford's land claim are worth $500, what land claims do you refer to?

A. I refer to the present improvements made on the two separate clearings.

Q. You, then, refer to the separate land claims upon which you each now reside?

A. I do.

Q. And yet you want to charge him with the $500 improvements you say are upon his land claim, and then,

after the determination of this suit, if you consider yourself injured, and see proper, you want to hold his claim and improvements as a part of your claim?

A. As I said before, I don't know what course I might take, at the present day, to obtain my rights."

It is impossible, in view of this testimony, taken long before the plaintiff in error filed his declaration, that the lands in controversy, should have been omitted from the original filing of the plaintiff in error by mistake.

I quote from the opinion of the Supreme Court of Oregon, as follows:

"On September 9 and 27, respectively, of that year the plaintiff and defendant filed their declaratory statements to the parcels of land upon which they had settled. More than a year afterwards the defendant amended his declaratory statements so as to include the tract in dispute and upon which the plaintiff had resided for quite a number of years and had built his house and barn and outhouses, set out an orchard, and made other improvements. The evidence shows and the court below finds that this was procured upon the *ex parte* affidavits of the defendant and two witnesses and without any notice to the plaintiff of the proceeding. It is beyond dispute, at this time and when these affidavits were made, that the plaintiff was then and had been during the time before mentioned residing upon and improving the identical land included in this amended statement. By this means the defendant was enabled to procure the patent in fraud of the rights of the plaintiff, and it is clear from the evidence but for such fraud and imposition he would not only have been entitled to but have been awarded the patent."

The attorney for the plaintiff in error endeavors to meet this proposition by saying:

In paragraph 22 of this bill he alleged that H. W. Sanford was allowed to amend his pre-emption filing so as to embrace the tract in dispute, by the Commissioner of the

General Land Office, *but he does not allege that that amendment was allowed by or through the use of false affidavits, or charge any fraud whatever in the procurement of said amendment.*

The plaintiff in error did not choose to bring up as a part of the record the bill of exceptions which contained the transcript of the proceedings in the contest in the land office, including the affidavits upon which the order allowing the amendment of his declaration was granted and which the Supreme Court of Oregon, upon the testimony to have been false and fraudulent as well as *ex parte.*

He rests his case as to this point upon the proposition that proof to show the falsity of the affidavits was not admissible under the allegation of the complaint.

But I respectfully submit:

First. That inasmuch as the statute prohibits the filing of a second declaration, and the proceedings for the allowance of an amendment is *ex parte* and an amendment is only allowed in case of a mistake, the burden is upon the party claiming the benefit of an amendment to show that it was legally and regularly allowed.

Secondly. That an allegation that the amendment was made without authority of law and was void, was not necessary and would have been a mere conclusion of law.

Thirdly. That the allegations of the complaint are sufficient to show that the case was one in which no amendment could be allowed. That the plaintiff in error was estopped from claiming the land and could not without perjury and fraud present to the Commissioner a *prima facie* right to the land, and that the admitted facts alleged in the complaint show that the omission to file on the land in his original declaration, was deliberate and intentional, and, therefore, he was not under the statute and the rules of the department, entitled to amend his filing. If this

appears from the whole complaint, it is sufficient at this stage of the case to sustain the decree of the Supreme Court of Oregon.

II.

That the defendant in error is equitably entitled to the land in controversy, and should have been awarded the same in the Land Office is established beyond controversy, by the findings of the lower court and the decision of the Supreme Court of Oregon.

If there is any reason upon the case as it stands, why the plaintiff in error can not be held by the court to be a trustee for the defendant in error of the title to the lands in controversy, and decreed to convey them to him, it is because such a case has not been made by the complaint and the findings of fact as authorizes a court of equity to revise the decision of the Land Office.

Every material allegation of the complaint traversed by the answer, was found in favor of the plaintiff in the court below, and as we have seen the case stated by the plaintiff in his complaint to show such fraud and imposition upon the officers of the Land Office and such mistake of law as would authorize a court of equity to relieve him against the decision of the Acting Secretary of the Interior, is admitted by the answer.

The question for the court to determine is whether the allegations of the complaint are sufficient to support the decree of the Supreme Court of Oregon, granting the plaintiff the relief prayed for.

The rule as to how far decisions in the Land Office are subject to revision by the court is stated in Creig *vs.* Leitensdorfor, 123 U. S. 189, as follows:

"The decisions of the officers of the Land Department made within the scope of their authority on questions

within their cognizance, is in general conducive everywhere, except when reconsidered by way of appeal within the Department; and, as to the facts on which their decision is based, in the absence of fraud or mistake, that decision is conclusive, even in courts of justice when the title afterwards comes in question. But there exists in the courts of equity the jurisdiction to correct mistakes, to relieve against frauds and impositions, and in cases where it is clear that those officers have by a mistake of law given to one man the land which on the undisputed facts belonged to another, to give appropriate relief."

Both the Circuit and Supreme Court of Oregon, the former in its conclusions of law and the latter in its opinion, recognized this rule to its fullest extent, and placed their decision upon grounds falling within it.

Chief Justice Lord, in delivering the opinion of the Oregon Supreme Court said:

"The defendant is the holder of a patent of the United States to said lands under the pre-emption law,; and the object of the present suit is to charge him as trustee of said property, and to compel a conveyance to the plaintiff. It may be admitted that the facts are not stated in the complaint with much conciseness or precision; but we think they are sufficient as alleged, if proved, to entitle the plaintiff to the relief for which he prays. There can be no doubt, but that it is the duty of the officers of the Land Department to determine upon the facts to whom patents shall be issued for the public lands. The law has intrusted them with the performance of this duty, and, when done, all reasonable presumptions must be indulged in support of their action. As to all matters of fact within the scope of their authority, their findings must be taken as conclusive in the absence of fraud and imposition.

This doctrine has often been expressly affirmed by the highest judicial tribunal of the country. *Johnson* v. *Towsley*, 13 Wall. 72; *Moore* v. *Robbins*, 96 U. S. 530; *Smelting Co.* v. *Kemp*, 104 U. S. 636. Hence, a patent cannot be collaterally attacked, but only by a direct proceeding in equity, based on mistake of the law in its issuance, or fraud and imposition in its procurement. 'If the officers of the

law,' said Mr. Justice FIELD, 'mistake the law applicable to the facts, or misconstrue the statutes, and issue a patent to one not entitled to it, the party wronged can resort to a court of equity to correct the mistake and compel the transfer of the legal title to him as the true owner. The court in such case merely directs that to be done which these officers would have done if no error of law had been committed. The court does not interfere with a title of a patentee when the alleged mistake relates to a matter of fact, concerning which these officers may have drawn wrong conclusions. A judicial inquiry as to the correctness of such conclusion would encroach upon a jurisdiction which Congress has devolved exclusively upon the department. It is only when fraud and imposition have prevented the unsuccessful party in a contest from fully presenting his case, or the officers from fully construing it, that a court will look into the evidence. It is not enough, however, that fraud and imposition have been practiced upon the department, or that false testimony or fraudulent documents have been presented. It must appear that they affected his determination, which otherwise would have been in favor of the plaintiff. He must in all cases show that but for the error or fraud or imposition of which he complains he would have been entitled to the patent. It is not enough to show that it should not have been issued to the patentee. It is for the party whose rights are alleged to have been disregarded that relief is sought, not for the government, which can file its own bill when it desires the cancellation of a patent unadvisedly or wrongfully issued.' *Bohall* v. *Dilla*, 114 U. S. 47, 5 Sup. Ct. Rep. 782; *Sparks* v. *Pierce*, 115 U. S. 408, 6 Sup. Ct. Rep. 102.

The application of these principles to the facts in hand are decisive of this case."

In this connection, I submit for the consideration of the court whether courts of equity are bound by the decisions of the Land Department upon questions of mere equitable jurisdiction, such as the question of an equitable estoppel. It was ably contended in the Supreme Court of Oregon on behalf of the plaintiff in error, that they are not. I quote from the brief of counsel the following:

"It is clear from the decisions already cited that the courts are only bound by the decision of the Land Department upon pure questions of fact, within the jurisdiction conferred upon its officers by law, unmixed with any question of law, and that as to all questions of an equitable nature courts of equity can only decide. And we submit that the question as to whether or not the appellant has been guilty of acts and conduct which ought in equity and good conscience estop him from asserting any claim to the land in controversy in this suit, and the land awarded to defendant is a question that can only be determined by a court of equity, and is not within the jurisdiction of the Land Department."

Johnson *vs.* Lowsley, 13 Wall., 72.
Shepley *vs.* Cowan, 91 U. S., 430.
Moore *vs.* Robbins, 96 U. S., 530, 535.
Marquez *vs.* Frisbie, 101 U. S., 473, 475, 476.

J. N. DOLPH,
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